

S. HRG. 108-394

DEPARTMENT OF LABOR'S PROPOSED RULE ON OVERTIME PAY

HEARING BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS UNITED STATES SENATE ONE HUNDRED EIGHTH CONGRESS SECOND SESSION

SPECIAL HEARING
JANUARY 20, 2004—WASHINGTON, DC

Printed for the use of the Committee on Appropriations



Available via the World Wide Web: <http://www.access.gpo.gov/congress/senate>

U.S. GOVERNMENT PRINTING OFFICE

92-256 PDF

WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON APPROPRIATIONS

TED STEVENS, Alaska, *Chairman*

THAD COCHRAN, Mississippi	ROBERT C. BYRD, West Virginia
ARLEN SPECTER, Pennsylvania	DANIEL K. INOUYE, Hawaii
PETE V. DOMENICI, New Mexico	ERNEST F. HOLLINGS, South Carolina
CHRISTOPHER S. BOND, Missouri	PATRICK J. LEAHY, Vermont
MITCH McCONNELL, Kentucky	TOM HARKIN, Iowa
CONRAD BURNS, Montana	BARBARA A. MIKULSKI, Maryland
RICHARD C. SHELBY, Alabama	HARRY REID, Nevada
JUDD GREGG, New Hampshire	HERB KOHL, Wisconsin
ROBERT F. BENNETT, Utah	PATTY MURRAY, Washington
BEN NIGHTHORSE CAMPBELL, Colorado	BYRON L. DORGAN, North Dakota
LARRY CRAIG, Idaho	DIANNE FEINSTEIN, California
KAY BAILEY HUTCHISON, Texas	RICHARD J. DURBIN, Illinois
MIKE DEWINE, Ohio	TIM JOHNSON, South Dakota
SAM BROWNRACK, Kansas	MARY L. LANDRIEU, Louisiana

JAMES W. MORHARD, *Staff Director*

LISA SUTHERLAND, *Deputy Staff Director*
TERRENCE E. SAUVAIN, *Minority Staff Director*

SUBCOMMITTEE ON DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES

ARLEN SPECTER, Pennsylvania, *Chairman*

THAD COCHRAN, Mississippi	TOM HARKIN, Iowa
JUDD GREGG, New Hampshire	ERNEST F. HOLLINGS, South Carolina
LARRY CRAIG, Idaho	DANIEL K. INOUYE, Hawaii
KAY BAILEY HUTCHISON, Texas	HARRY REID, Nevada
TED STEVENS, Alaska	HERB KOHL, Wisconsin
MIKE DEWINE, Ohio	PATTY MURRAY, Washington
RICHARD C. SHELBY, Alabama	MARY L. LANDRIEU, Louisiana
	ROBERT C. BYRD, West Virginia (Ex officio)

Professional Staff

BETTILOU TAYLOR
JIM SOURWINE
MARK LAISCH
SUDIP SHIRIKANT PARIKH
CANDICE ROGERS
ELLEN MURRAY (*Minority*)
ERIK FATEMI (*Minority*)
ADRIENNE HALLETT (*Minority*)

Administrative Support
CAROLE GEAGLEY

CONTENTS

	Page
Opening statement of Senator Arlen Specter	1
Statement of Hon. Elaine L. Chao, Secretary, Department of Labor	2
Prepared statement	4
Prepared statement of Senator Tom Harkin	7
Opening statement of Senator Patty Murray	8
Opening statement of Senator Thad Cochran,	17
Responses of Secretary Chao to committee questions	21
Statement of Richard L. Trumka, Secretary-Treasurer, AFL-CIO	23
Prepared statement	25
Statement of David S. Fortney, co-founder, Fortney & Scott	29
Prepared statement	31
Statement of Dr. Jared Bernstein, Ph.D., chief economist, Economic Policy Institute	35
Prepared statement	37
Statement of Dr. Ronald Bird, Ph.D., chief economist, Employment Policy Foundation	40
Prepared statement	42
Statement of Andrew J. McDevitt, manager, Governmental Relations, American Payroll Association	50
Prepared statement	52
Statement of Patty Hefner, on behalf of the American Nurses Association	53
Prepared statement	55
Responses of Richard Trumka to committee questions	58
Responses of Ronald Bird to committee questions	62
Responses of David S. Fortney to committee questions	65

DEPARTMENT OF LABOR'S PROPOSED RULE ON OVERTIME PAY

TUESDAY, JANUARY 20, 2004

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN
SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 11 a.m., in room SD-106, Dirksen Senate Office Building, Hon. Arlen Specter (chairman) presiding.
Present: Senators Specter, Cochran, Craig, and Murray.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. Good morning, ladies and gentlemen. It is 11 a.m. We will now proceed with the hearing of the Appropriations Subcommittee on Labor, Health and Human Services, and Education, to examine the proposed regulations by the administration modifying overtime pay. This issue is a highly controversial one. In the U.S. Senate by vote of 54 to 46, there was a prohibition against any funding for implementing the regulation. In the House of Representatives, there was a vote to bar use of Federal funds to implement the regulation, which failed by three votes. And later there was a vote to send instructions to the committee, which passed.

So both the House and the Senate are on the record as denying—as recommending the denial of funds to the administration for the implementation of this regulation.

The administration contends that there needs to be a revision in the regulations on overtime pay, which have been in existence for a long time and are confusing. There is concern that the new regulation will cause a loss of compensation to many individuals at a time when the economy, while recovering, has not yet fully recovered, and the economy is fragile. There is a real concern about denying compensation to individuals on the current status of the economy.

In reviewing the proposed regulations, it is hard to see how there will be any significant improvement from the existing law, admittedly vague. The proposed regulation provides as to administrative employees someone who holds a position of responsibility with the employer defined as either performing work of substantial importance or performing work requiring a high level of skill or training.

How you define substantial importance with any precision, what is very difficult to me, how you define performing work requiring a high level of skill or training, again, looks very difficult. The current regulations provide “customarily and regularly exercises dis-

cretion and independent judgment." Hard to see much of an improvement on precision in telling employers exactly what the law should be.

With respect to the definition of professional employees, the proposed regulations provide "primary duty of performing work requiring knowledge of an advanced type of field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction but which also may be acquired by alternative means, such as an equivalent combination of intellectual instruction and work experience."

Contrast that with the current regulation, which provides as to professional employees consistently exercises discretion and judgment primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.

Here again, during the course of this hearing, we will examine these definitions. But again, speaking as someone who has had extensive experience both as a legislator and a lawyer, it is hard for me to see how the new regulation is going to avoid litigation, which is the principle of the new regulation.

As the record shows, I have introduced a bill which would call for a commission to come up with better definitions to delineate these issues with representatives appointed by the Secretary of Labor, from business management, and the private sector, to try to come to grips with these issues.

We have a long witness list. I held my opening statement to 5 minutes. And we are going to ask the witnesses to limit their statements to 5 minutes, as well.

STATEMENT OF HON. ELAINE L. CHAO, SECRETARY, DEPARTMENT OF LABOR

ACCOMPANIED BY TAMMY D. McCUTCHEON, ADMINISTRATOR, WAGE AND HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR

Senator SPECTER. We are joined by the distinguished Secretary of Labor, the Honorable Elaine Chao, 24th Secretary of Labor, an initial employee of the appointee of the President, started on January 31, 2001, a very distinguished record, had been president and CEO of the United Way Foundation from 1992 to 1996, served as director of the Peace Corps and Deputy Secretary of the Department of Transportation under President George H.W. Bush, most recently a distinguished fellow at the Heritage Foundation, an MBA from Harvard Business School, and an undergraduate degree from Mount Holyoke.

Welcome, Secretary Chao. And the floor is yours.

Secretary CHAO. Mr. Chairman and members of the subcommittee, thank you for the opportunity to be here this morning to discuss a very important issue, and that is the Department's efforts to protect the overtime pay of working Americans. Our job at the Department of Labor is to make worker protections work. And this administration has achieved record results in protecting workers' pay, benefits, and safety.

Last year, all across the Department, enforcement was at record levels. The Wage and Hour Division, for example, collected over \$200 million in back wages, including overtime. And that is an 11-year high and an increase of 60 percent in just 2 years. We care about protecting workers. And we are doing our job aggressively at the workplace.

One worker protection that does not seem to be working very well, or as well as it should, is an overtime provision in the Fair Labor Standard Act pertaining to the regulations of white collar workers. Overtime is one of the most important rights that American workers have. But this particular legal protection has been severely weakened, because the Department has not updated and strengthened its regulations defining overtime for white collar workers.

Today, employees earning about \$8,000 can be labeled as an executive and denied both minimum wage and overtime pay. And because the white collar duties tests have not been updated in over 50 years, neither workers nor employers or even many experts in the field can tell for certain who is entitled to overtime for white collar workers. As a result, workers are increasingly forced to resort to the courts and wait 3 or 4 years to recover the overtime pay that they are entitled.

Federal class action lawsuits on white collar regulations now outnumber all employment discrimination lawsuits combined. Low wage workers are being denied overtime. Middle-class workers must wade through years of exhaustive and expensive litigation to receive their rightful pay. And if this Department is blocked from giving workers updated, stronger overtime protections, these workers will pay the price.

They will pay the price by not receiving \$897 million a year in overtime that they deserve. They will pay the price because needless litigation will divert nearly \$2 billion away each year from job creation and better pay and benefits.

If these rules were clearer, the Department of Labor would be able to recover back pay for workers within about 3 months, on average.

I think everyone recognizes the need to modernize these rules. Reform of the Part 541 regulations actually began in the Carter administration. The wage and hour administrator in the Clinton administration once said that reforming the white collar regulations was one of the two key things on her agenda.

In a recent report to Congress, the GAO recommended that the Secretary of Labor review the regulations and make necessary changes to better meet the needs of both employers and employees in the modern workplace. In 1989, recognizing how outdated these regulations have become, Senator Kennedy cosponsored legislation to extend the overtime exemption for the first time to computer system analysts and software engineers. And the legislation was adopted by unanimous consent in the Senate.

There is broad agreement that reform is necessary. And using the regulatory process mandated by Congress, the Department is seeking to restore and renew the overtime protections intended by the Fair Labor Standards Act. It has been almost a year since we first published our proposal. We have since reviewed thousands of

comments. We have listened to Members of Congress. And we intend to put forward a revised final rule that is responsible and responsive to the public record.

So let me be clear. The Department's overtime proposal for white collar workers will not eliminate overtime protection for 8 million workers, as is alleged. It will not eliminate overtime protections for police workers, police officers, firefighters, first responders, paramedics. It will not eliminate overtime for nurses. It will not eliminate overtime protections for blue collar employees and work such as carpenters, electricians, mechanics, plumbers, laborers, teamsters, construction workers, production line workers, and other blue collar employees. It will not affect union workers, because they are protected by the collective bargaining agreements.

Claims to the contrary serve only to confuse the public debate, frighten workers, and make them potentially more vulnerable to unscrupulous employers. The Department's overtime proposal for white collars is pro-worker. And it is pro-job creation. It will strengthen overtime protection for millions of low wage and middle-class workers. It will clarify regulations so that workers—it will clarify these outdated regulations so that workers can know what their rights are and employers can know what their responsibilities are.

PREPARED STATEMENT

It will also enable the Department of Labor to vigorously enforce these laws and rules and regulations. It would also put an end to needless litigation.

America's workers do deserve action, not more studies or delays, but a fair and balanced rule that responds to the tens of thousands of Americans who have already told us what they hope to see in a strengthened overtime standard for white collar workers for the 21st century workforce.

Thank you, Mr. Chairman.

[The statement follows:]

PREPARED STATEMENT OF HON. ELAINE L. CHAO

Mr. Chairman and Members of the Subcommittee: I am pleased to appear before you today to discuss the Department of Labor's proposed revision of the Fair Labor Standards Act's "white-collar" regulations. These regulations set forth the criteria for determining who is excluded from the Act's minimum wage and overtime requirements as an executive, administrative, or professional employee. The regulations that the Department is revising appear in Title 29 of the Code of Federal Regulations, at Part 541.

When Congress passed the Fair Labor Standards Act (FLSA) in 1938, it chose not to provide definitions for many of the terms used, including who is an "executive, administrative or professional" employee. Rather, in Section 13(a) of the Act, Congress expressly granted to the Secretary of Labor the authority and responsibility to "define and delimit" these terms "from time to time by regulations."

As you are aware, there has been an enormous amount of press coverage since the proposed rule was published in March 2003. Given the importance of this issue, the amount of press coverage has been deserved. However, much of the reported information has been misleading and inaccurate. I welcome the opportunity today to set the record straight regarding the intentions of the Department in issuing an update to the Part 541 regulations. I also welcome the opportunity to re-emphasize the Department's goals in undertaking this important task.

Let me also state to the members of this subcommittee that the comments from both Congress and the public have been a tremendous help to the Department. I

believe the final rule will successfully address the concerns that have been raised, and will be stronger as a result of the comment process

There are many reasons for updating this half-century old rule. The primary goal is to have better rules in place that will benefit more workers. Because the rules have not been updated in decades, changes are necessary now to provide hard-working Americans who currently do not automatically have that right, the opportunity to receive overtime pay. Had these changes been made 10 years ago, lower-wage workers would have had an additional \$8 billion in their paychecks. The proposed rule would lead to guaranteed overtime for an additional 1.3 million low-wage workers. The main purpose of this effort is to restore the intent of the FLSA—to restore overtime protections, especially to low-wage, vulnerable workers who have little bargaining power with employers. Of the 1.3 million workers who would be guaranteed overtime pay under the Department's proposal, all earn less than \$22,100 per year; nearly 55 percent are women; more than 40 percent are minorities; nearly 25 percent are Hispanic; and nearly 70 percent have only a high school education or less.

The job "duties" tests have not been updated since 1949 and are plainly written for an economy that has long passed us by. As I have pointed out many times, the existing regulations identify occupations such as leg men, straw bosses and key-punch operators—all occupations which no longer exist in the 21st century workplace. The salary basis test was set in 1954. The minimum salary levels were last updated in 1975, some 29 years ago. Under the salary rates that are still in effect today, an employee earning only \$8,060 a year may qualify as an exempt "executive." Another important goal is to create rules that can be more easily read and understood. Greater certainty and clarity will allow workers to be paid properly. Under the current rules, burdensome and costly class actions lawsuits are often necessary to sort out the rights of employees and the obligations of employers. This is harmful to workers who often must wait years to realize their rights, and burdensome to employers who otherwise could use litigation costs to grow and expand their businesses and create new jobs. Indeed, overtime is the fastest growing area of employment litigation in America. Overtime litigation costs are currently draining an estimated \$2 billion a year out of resources that could be better used to grow the economy and create jobs.

Clear, concise and updated rules will better protect workers and strengthen the Department's ability to enforce the law. With more clearly defined rules in place, the Department will be able to more quickly and efficiently settle overtime pay disputes, and build upon its strong enforcement record on behalf of workers.

The existing regulations require three basic tests for each exemption: (1) a minimum salary level, now set at \$155 per week for executive and administrative employees and \$170 per week for professionals under the basic "long" duties tests for exemption, whereas a higher salary level of \$250 per week triggers a shorter duties test in each category; (2) a salary basis test, requiring payment of a fixed, predetermined salary amount that is not subject to reduction because of variations in the quality or quantity of work performed; and (3) a duties test, specifying the particular types of job duties that qualify for each exemption.

Our proposal would increase the minimum salary level required for exemption as a "white-collar" employee to \$425 per week, or \$22,100 per year. This is a \$270 per week increase, and the largest increase since the Congress passed the Fair Labor Standards Act in 1938. Under this change, all employees earning less than \$22,100 a year automatically would be entitled to the overtime protections of the FLSA. Under the existing rules, even a worker earning minimum wage would not be automatically entitled to overtime protections. We believe that this change would result in an estimated 1.3 million additional workers becoming eligible for overtime pay for the first time, sharing up to \$895 million in additional wages every year.

As in the current regulations, the Department's proposal also includes a streamlined test for higher-compensated "white-collar" employees. To qualify for exemption under this section of the proposed rule, an employee must: (1) be guaranteed total annual compensation of at least \$65,000, regardless of the quality or quantity of work performed; (2) perform office or non-manual work, and (3) meet at least one or more of the exempt duties or responsibilities specified for an executive, administrative, or professional employee. This is the same concept found in the current rule's "Special Proviso for High Salaried Executive," commonly referred to as the "short test." The test for these "highly compensated" workers has been the subject of many of the comments we have received.

The Department's proposal would simplify, clarify and update the duties tests to ensure that the regulations are easy for employees and employers to understand and for the Department to enforce. The current rule provides two sets of duties tests for each of the three exemption categories. There is both a "short" duties test and

a "long" duties test for each of the executive, administrative and professional exemptions. The current long duties tests only apply to employees earning between \$8,000 and \$13,000 a year. Given these low levels, these tests essentially have been inoperative for a decade. Accordingly, to simplify this complex process the Department's proposal would eliminate the long duties test and instead rely on the existing "primary duty" approach found in the current short tests. To be exempt, an employee must receive the required minimum salary amount and have a primary duty of performing the duties specified for an executive, administrative or professional employee.

Under the Department's proposal, the executive exemption adds a third requirement to the current short test that makes it more difficult to qualify as an exempt executive. In other words, fewer workers would qualify as exempt executives under the proposal than qualify for the exemption under the current regulations. Under the proposal, an exempt executive must (1) have a primary duty of managing the entire enterprise or a customarily recognized department or subdivision thereof, (2) direct the work of two or more other workers, and (3) have authority to hire or fire other employees or have recommendations as to the hiring and firing be given particular weight. This third requirement is from the long duties test, and its addition makes the exemption more difficult to achieve.

The Department did not propose substantial changes to the professional exemption. To the extent debate in Congress and comments submitted expressed concern that the Department was upsetting the law in this area, let me say that the Department intends to clarify that this is not the case.

In any rule-making process, certain areas receive more public comment than others. The Department's proposed revision to the administrative exemption is one such area. The major proposed change to the duties test for the administrative exemption is replacing the "discretion and independent judgment" requirement, which has been a source of much confusion and litigation, with a new standard that exempt administrative employees must hold a "position of responsibility with the employer." To meet this requirement, an employee must either customarily and regularly perform work of substantial importance or perform work requiring a high level of skill or training. In our proposal, the Department specifically sought comment about replacing the "discretion and independent judgment" element of the test. Both proponents and opponents of this proposed change submitted lengthy and helpful comments that the Department very carefully and deliberately is considering.

Despite what has appeared in the press, let me emphasize that it has never been the intent of the Department to upset the overtime rights of hardworking American workers. The recent debates in the Senate and House have helped the Department identify areas in which the intent of these revisions needs to be made clearer. For example, it is not, nor has it been, the intent of the Department to change the overtime status of police, firefighters, paramedics, EMTs and other first responders. Similarly, it is not, nor has it been, the intent of the Department to change the overtime rights of registered nurses, licensed practical nurses and other similar health care employees. The Department also did not intend to substantially change the educational requirements for the professional exemption.

Furthermore, the overtime status of "blue collar" workers will not change. "Blue collar" employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, and construction workers will not see their right to overtime change. This regulation will not affect workers subject to a collective bargaining agreement. These and other critical issues will be addressed in the final rule, and the Department extends its gratitude to Congress for raising issues that need more explicit clarification.

As the Department pointed out to the Subcommittee in July of last year, updating the Part 541 regulations is a bi-partisan issue. This is not a Republican or Democratic issue, and it is not a new idea. The Carter administration recognized in 1979 that the rules were antiquated and placed Part 541 reform on the Department's regulatory agenda. This issue has been on the Department's regulatory agenda for more than two decades. The last Administration before this one to suggest that these regulations be modernized was the Clinton administration.

Significantly, the U.S. General Accounting Office (GAO) in 1999 issued a report¹ on the "white-collar" exemption regulations and recommended the path we find ourselves on today. The GAO chronicled the background and history to the exemptions, estimated the number of workers who might be included within the scope of the exemptions, and identified the major concerns of employers and employees. The GAO

¹Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place (GAO/HEHS-99-164, September 30, 1999).

concluded that “given the economic changes in the 60 years since the passage of the FLSA, it is increasingly important to readjust these tests to meet the needs of the modern work place,” and recommended that “the Secretary of Labor comprehensively review the regulations for the white-collar exemptions and make necessary changes to better meet the needs of both employers and employees in the modern work place. Some key areas of review are (1) the salary levels used to trigger the regulatory tests, and (2) the categories of employees covered by the exemptions.”

Finally, I would like to address recent media stories suggesting that the Department of Labor is giving employers “tips” on how to evade overtime requirements. These news reports are completely false and potentially harmful to workers’ rights as they may give some employers the impression that they can ignore the FLSA overtime requirements. The news reports refer to a single paragraph in the economic analysis section of the preamble to the Notice of Proposed Rulemaking published last March. This paragraph discusses the estimated range of potential impacts of this rulemaking and does not contain “tips” or “instructions” on how to cut pay or avoid paying overtime. The Department is legally-required to discuss the range of likely effects in an economic impact analysis. This must be performed for every significant rule that DOL issues.

The Department of Labor has “zero tolerance” for employers who try to play games with the overtime laws. I am proud to say that the Department’s Wage and Hour Division has increased enforcement by 60 percent in the past two years, and collected in fiscal year 2003 a record \$212 million in back wages for employees.

In conclusion, the Department continues to work on developing a final rule that is based on the comments we have received and the debate we have heard. We are working diligently to achieve a rule that takes into consideration the concerns that have been expressed and that makes sense for the 21st Century Workplace. It will also protect the overtime rights of American workers far better than the half-century old regulation now on the books. Today’s workers are not protected at all—they are severely disadvantaged by rules that few can understand in the context of the modern workplace. They are disadvantaged if they have to go to court to get overtime wages they have rightfully earned. And, they are disadvantaged if they have to wait years for that money to find its way into their pockets. Mr. Chairman, it is time to update this rule. I would be happy to answer any questions Members of the Subcommittee may have.

Senator SPECTER. Thank you very much, Secretary Chao.

Senator Craig, would you care to make an opening statement before we proceed with questions?

Senator CRAIG. No, thank you. I do appreciate you holding a hearing on this most important issue, Mr. Chairman. I have a variety of questions I want to ask the Secretary. So I would be happy to move into the questioning phase.

Senator SPECTER. Senator Harkin, the ranking member, is unavoidably detained. He is in Iowa. I do not know why, exactly, except for the caucuses. But he will be here a little later today. And without objection, a statement from Senator Harkin would be made a part of the record.

[The statement follows:]

PREPARED STATEMENT OF SENATOR TOM HARKIN

Thank you, Mr. Chairman for holding this important hearing. I also want to thank all of the witnesses who are here today.

Both houses of Congress, on a bipartisan basis, voted for my amendment to block the Administration’s proposed new rule on overtime. Both houses voted to block the Administration’s radical rewrite of the nation’s overtime laws. That amendment passed 54 to 45 here in the Senate and 221 to 203 over in the House. The Congress of the United States spoke up clear as a bell and said, “No, the Administration must not strip overtime rights from 8 million American workers.”

But as we all know, the Administration refused to accept the will of Congress even when you, Mr. Chairman, repeatedly offered to work out a compromise.

And so here we are today, faced with an Omnibus bill that was stripped of my amendment to protect overtime pay for millions of American workers.

The Administration’s new rule, which they will issue in March, is a stealth attack on the 40-hour workweek, pushed by the White House without a single public hear-

ing. I also am very troubled that this proposed rule contains specific advice to employers on how they can get around paying overtime to low-income workers. It is a gut-punch to American workers.

This sweeping proposal is in direct contrast to the intent of the Fair Labor Standards Act of 1938 that established the 40-hour work week for American's workers. And it's a slap in the face to the millions of American workers who depend on overtime pay to support their families and make ends meet. We're talking about taking away some 25 percent of the income of many American workers.

Furthermore, taking overtime eligibility away hurts job creation. When employers can require current employees to work more hours for no additional cost, there is a disincentive to hire new workers.

Congress did the right thing in voting to block this new rule. And its shameful that House leaders stripped the provision the appropriations bill we will vote on this afternoon.

But I am here to serve notice that I will not give up, nor will others who have fought this.

The American people will not allow us to drop this issue. They have been watching this issue closely, because it hits so close to home. I pledge to them that I will offer the overtime amendment to every piece of legislation until we succeed.

Senator SPECTER. Senator Murray, would you care to make an opening comment?

Senator MURRAY. I would, Mr. Chairman.

OPENING STATEMENT OF SENATOR PATTY MURRAY

I really appreciate the opportunity. And I thank you for calling this second hearing on the proposed regulatory changes that the Department of Labor has put forth regarding overtime pay. And I really am here today to express my outrage at the Republican leadership in Congress for really disregarding the will of a bipartisan majority of Members in both houses when they removed the Harkin amendment from the final omnibus appropriations bill for fiscal year 2004.

It really is inconceivable to me that as families struggle in today's economy that the Bush administration and some in this majority are cutting off the pay of really millions of workers who depend on their overtime pay to make ends meet today. Without any hearings, the Secretary of Labor, with just a few strokes of her pen, is about to adversely affect the quality of life for millions of hard-working families.

Here we are with so many Americans out of work, many people struggling to keep their jobs, millions have lost their pension benefits and their healthcare benefits, and now this administration is going to force a pay cut on those who work overtime for their employers. And we know that overtime pay often makes up 25 percent of an eligible worker's wages. I don't think we should forget, too, that many of these workers are now the only breadwinners in their families.

Mr. Chairman, this change is going to really hurt some 8 million hardworking Americans who have worked hard, played by the rules, and are now going to have to endure as much as a 25-percent pay cut. Right now, our firefighters, our police, our EMTs, we all know are working hard on the front lines of homeland security. And they are going above and beyond the call of duty, often with inadequate equipment and training. But they are doing it to protect us in this very dangerous time. Many of them are working on overtime.

Now this administration is telling our firefighters, our police, and our EMTs that they do not deserve overtime pay for the extra work that they are doing to keep us safe. And to top it off, I, like a lot of people, was very concerned and upset that the Department of Labor provided employers with tips on how to avoid paying employees overtime. I want to hear about that today.

So Mr. Chairman, I really appreciate your calling this hearing. I look forward to working with you and others to develop a truly bipartisan solution to some of the critical policies that are affecting Americans and their families today who are struggling to pay their mortgage and put food on the table.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Murray.

We will now proceed, as is our custom, with 5-minute rounds.

Madame Secretary, we are loading on a cloture motion on the omnibus appropriation bill today, which means that we have a large appropriations bill, and we have to get 60 votes to proceed to vote on the matter. And that is why this hearing was scheduled in advance of that vote. And there are three issues in contention which might resolve the differences of opinion between the two parties. And the key issue is this overtime regulation.

The proposal to delay implementation until September 30 is what would really, I think, break the knot and enable us to go forward on this omnibus bill. Very important for the Subcommittee on Labor, Health, Human Services, and Education, important funding for your Department, important funding for the National Institutes of Health, important funding for HeadStart and for many, many other programs.

We are now at January 20, almost half the way to September 30. The Department has received some 80,000 comments. And you are projecting to have the regulation in final form by March 31. After that, it has to go through the Office of Management and Budget, which takes considerable time. And a key question on my mind is: How much would be lost to your interest in putting a regulation forward between whatever date it can be completed and September 30? How much time are we really talking about?

Secretary CHAO. I think enough time has been spent on delays, as well as studies and studies of all sorts on this issue. As I mentioned, this issue has been on the regulatory agenda since the Carter administration. There is a great deal of concern and also agreement that something has to be done to clarify these regulations.

The duties test has not been clarified in well over 50 years. The salaries test has not be clarified in over 25 years. There are 1.3 million workers not getting their guaranteed overtime right now. And any further delay will only in fact harm workers.

Senator SPECTER. Madame Secretary, I understand the lengthy period of time. But that does not answer my question. And I would like you to take a look at my question, if you would. I have many questions, and I have 2 minutes and 16 seconds left. And I intend to observe the time limitations, as I will ask every other member to. But focus on the question which I have asked you.

I know how long it has been since the Carter administration when this issue has been considered. But this is January 20. And

you are projecting to March 31. So you have October, November, December. By March 31, half the fiscal year will have passed. Then you have OMB.

How much time are you looking at from the time there will be a regulation until September 30, which is all that is asked for in the prohibition of funding, until the end of this fiscal year.

Now let me move to the really core question on the substance. And you have the definition of the proposed regulation of an administrative employee to perform work of substantial importance or perform work requiring a high skill level or training. Now how much difference is there in that? And how do you define substantial importance to avoid litigation contrasted with the current regulation, which is customarily and regularly exercises discretion and independent judgment?

With respect to professional employees, the proposed regulation calls for advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction at an alternative to have the equivalent combination of intellectual instruction or work experience, with the very similar language in the current law, which says, "Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study."

My time has now expired, and you have the floor.

Secretary CHAO. The specific instances that you mention are indeed very complicated. This is a very complicated and a very detail-oriented rule. The outdated portions of this rule are creating a great deal of confusion. It is creating confusion among employers, employees, and also even experts.

So on your specific question, I will ask Tammy McCutchen, who is the Administrator for the Wage and Hour Division, to address that. Thank you.

Ms. MCCUTCHEN. We have received the most comments on the administrative exemption test. And so it is something that we are going to be taking a close look at as we are developing a final rule, so that we can try to improve on the administrative test.

On the professional exemption question you asked, the language that you mentioned is about defining what it means to customarily acquire the knowledge by an advanced degree. And it reflects the current case law and the current language in the regulations that says the occasional chemist without a chemistry degree or the occasional lawyer without a law degree is still entitled to the exemption, because it is a profession that, as a standard prerequisite for entry into the field, requires that advanced 4-year degree.

The case that we cited in the preamble was an example of an engineer, who had 3 years of engineering courses in college and 30 years of on-the-job experience. And the court found that he was indeed an exempt engineer, although he did not finish that 1 year of college and get his engineering degree.

That was the intent of our proposal. We did get some significant comments on that. And we will make sure we clarify that in the final rule.

Senator SPECTER. As I had noted, my time had expired prior to the start of the answers. We are going to follow, as we customarily do, the early bird rule.

Senator Craig, you were the first to arrive.

Senator CRAIG. Thank you very much, Mr. Chairman.

I spent a good deal of time trying to understand the issue and also trying to deal with your proposed regs against the rhetoric that has often spewed out against them, the proposed regs. And I have tried to take the politics that is in that language and pull it out to see if there is a substantive difference of the allegations made.

So Madame Secretary, when the Economic Policy Institute's paper came out last summer and it varied widely from the projections the Department of Labor issued as it related to white collar exemptions, I think the EPI paper projected or asserted that some 8 million workers would lose the right to overtime pay. And DOL's figures are less than 750,000. Now that is a huge discrepancy.

So I tried to ring the politics out of that one, because most of the substance is fairly well salted with politics, and look at it from that standpoint. Could you go into that briefing, as prepared by EPI, and speak of the differences between an 8 million figure and a 750,000 workforce figure?

Secretary CHAO. The EPI study shows gross misunderstanding of the current regulations and the proposal that the Department is putting forward. It includes, for example, people who are already exempt under current law. The EPI report greatly overestimates the number of workers who may be reclassified. It included in the 8 million estimate part-time workers, other employees who never work more than 40 hours per week.

It also claims that the Department is expanding the executive exemption, when actually the Department's proposal would actually make it more difficult to qualify as an exempt executive than it is today. EPI contends that most nurses and medical technicians, for example, will also lose overtime pay, although the Department has proposed no changes at all. EPI also alleges that most cooks will lose overtime, and that is not true either.

The Department has studied this report. Our report is based on independent—our economic analysis is based on independent, well-regarded economists. And we found at least 15 very basic errors in this EPI report. And every error leads to additional unjustified inflation of the number of employees that may potentially be impacted. We believe that 1.3 million workers will gain overtime—they will be guaranteed overtime—and that less than about 644,000 may potentially face the prospect.

But as I mentioned, the rules and regulations are so unclear at this point, what we want to do is to clarify them.

Senator CRAIG. Well, I think at least that was partly my observation, the confusion of what is and what is not and what you are actually doing versus what is already being applied in current law.

Concern of the unions has been loudly spoken. And yet the analysis that you have just given would suggest that a good many union folks will be untouched by this. And you went on to say in your opening statement that the collective bargaining agreements

cover and protect. Well, then, what group is the most dis-served group by the proposal that you are offering?

Secretary CHAO. Our intent is not to take away overtime, not at all. Our intent is to strengthen overtime. And what we have seen occurring is tremendous confusion over an outdated regulation. Our purpose is to protect workers. And we have a responsibility, as the Government, to ensure that the rules and regulations that emanate from our Department are clear and easy to comply with. And right now, the rules and regulations are not easy to comply with. There is a great deal of confusion.

So we hope that the adverse impact will be minimal. And we will work very hard in our final proposal to make that the case. But this is a white collar exemption, regulation. So it will not impact, for example, union members covered by collective bargaining agreements. It will not cover firefighters, policemen, paramedics, other first responders. It will not cover those who engage in manual work. This is white collar exemption, white collar regulation. So it is primarily office work and people who do non-manual work.

Senator CRAIG. Thank you. My time is up.

Senator SPECTER. Thank you very much, Senator Craig.

Senator Murray.

Senator MURRAY. Well, thank you, Mr. Chairman.

I am listening carefully to you, Madame Secretary. And I think what you are saying is that under current collective bargaining agreements, it will not apply. But as we all know, collective bargaining agreements end. And it will be up to the employer to make a determination under the new regulations. So I think that we all need to understand that.

But my question really goes, as a former preschool teacher and a former school board member, I really am concerned about the proposed regulations, attempts to lower the education requirement for professional employers. Under the current law, dental hygienists fall within the professional exemption to the 40-hour workweek only if they have completed 4 years of pre-professional and professional study. Under your new proposed rule, dental hygienists with only 2 years of academic training and work experience can now fall into the exemption.

If employers decide that their employees' work experience in a field that customarily requires a degree—and there is a lot of them—biology, nursing, engineering, culinary, accounting—there is a lot of them—have the same knowledge as workers with degrees, will not the employers now really be free to deny those workers overtime?

Secretary CHAO. Let us not forget that the proposal is indeed a proposal. Before the proposal went out in its initial form, the Department held numerous meetings with various stakeholders. After the proposal went out, we were in the process of soliciting comments. As mentioned, there have been tens of thousands of comments. The Department will evaluate these comments.

Senator MURRAY. So do we expect to see some changes in the education requirements?

Secretary CHAO. I cannot say that right now, because the rule is not final. But I have said on many other occasions, as have others

in the Department, that we take these comments very seriously. And we will evaluate them.

Tammy, do you have anything else to say?

Ms. McCUTCHEON. Just to repeat what I said before, that it was not our intent to lower the educational requirements for the professional exemption. And we did get comments on that and that we will be addressing those in the final regulations.

Senator MURRAY. And that final regulation comes out in March. We will have not any opportunity to comment or speak to it once the final rule comes out. Correct?

Secretary CHAO. There has been comments again in the public record, as we have mentioned, in tens of thousands. According to the APA procedures, that is what the—the comments in the public record are what we consider. And we do consider them very seriously. We have been evaluating them. We have also been listening to the Members of Congress who have expressed their concerns.

Senator MURRAY. Well, okay. I am hopeful that we will see some changes in that, because I think that is a very important issue that many of us are extremely concerned about.

Let me mention another one. I think that all of us know that the men and women in our armed forces are currently performing heroically on a number of fronts around the world. And I am very concerned with your proposal that the veterans who now get overtime could lose it because the draft rule allows the military to equate training received in the military as equivalent to a 4-year degree.

Unfortunately in your proposal, there is no guidance on how to make the determination on whether or not a veteran's training in the military is equivalent to a 4-year degree. And under your new proposed rules, veterans that are now receiving overtime could well lose it. Can you please comment on that and what you see you are going to change in the final rule to assure that that does not happen?

Secretary CHAO. I think first of all the military is not covered by these regulations.

Senator MURRAY. But we are speaking about veterans who are working—

Secretary CHAO. And second—

Senator MURRAY [continuing]. Who it will apply to.

Secretary CHAO [continuing]. In terms of training as a general observation, overtime will not be taken away. But again, the comments that we have received during this review process will be very important.

Senator MURRAY. Well, again, that will depend on how you write how the equivalency of training is in the final rule on, something I think we, as Members of Congress, need to be very well aware, because it could have a real adverse impact on a number of people who you are saying right now it does not. Many others are saying it will. It depends on how you write that rule.

So I am deeply concerned about this moving forward without congressional action.

Mr. Chairman, I see that my time is just about up. I just want to make one comment.

I keep hearing that you need to do this to avoid litigation, reduce litigation, because the rules are confusing. But I think the proposed

regulations contain a lot of new and very vague terms that can spawn a whole new wave of litigation. I think these criticisms were made recently by Hewitt, who is one of the leading management consulting firms in the Nation, who said these proposed changes likely will open the door for employers to reclassify a large number of previously nonexempt employees as exempt.

It goes on to say that the resulting effect on compensation and morale could be detrimental as employees previously accustomed to earning in some cases significant amounts of overtime will suddenly lose that opportunity.

I just, very quickly, Madame Secretary, do you—are you aware that the employer community fully expects to reclassify a large number of previously nonexempt workers once these go into place?

Secretary CHAO. Well, first of all, I have not heard that study. And that is a singular study that is very unusual. Most people just want clarity. The Government—

Senator MURRAY. I will be happy to supply the—get that to you. Secretary CHAO. I will be glad to see it.

Senator MURRAY. Okay. Thank you very much.

Thank you, Mr. Chairman.

Senator SPECTER. Madame Secretary, turning the clock back to last November 20, which was a Thursday, and the House of Representatives was going to vote either that night or the next morning. And we were looking at two alternatives. One was a continuing resolution in which event the regulation would go into effect, because there would certainly be no prohibition against it.

Second, to delete the prohibition to defeat the regulation, in which event we would have the omnibus appropriations bill. So we were looking at having additional funding in my subcommittee alone of \$3.7 billion. And either way we went, the regulation would go into effect.

There was a meeting. There were meetings all day long. But we had one with the four key members, with Chairman Young and Chairman Regula of the House, Senator Stevens and myself of the Senate. And we sought to schedule a meeting with you at 7:15 to try to see if we could find some way out. Then I wrote to you on November 24. And you replied on December 2. Without objection, both letters will be made part of the record.

[The letters follow:]

U.S. SENATE,
Washington, DC, November 24, 2003.

Hon. ELAINE CHAO,
Secretary, Department of Labor, Washington, DC.

DEAR SECRETARY CHAO: Last Thursday afternoon, November 20, 2003, Senate Appropriations Chairman Ted Stevens, House Appropriations Chairman Bill Young, House Appropriations Subcommittee Chairman Ralph Regula and I were involved in extensive discussions on how to handle the overtime issue which was the final impediment to the appropriations bill for the Departments of Labor, Health and Human Services and Education. At about 5:15 P.M., we instructed staff to ask you to meet with us at 7:15 P.M. that evening because time was of the essence. I was later advised that you were not available. Additional efforts to resolve the overtime issue continued on through Thursday evening and into Friday, November 21. I placed a call to you at about 12:30 P.M. I did not receive a call back until 5:30 P.M. when I had already returned to Pennsylvania.

It is unacceptable for the Secretary of Labor to be unavailable to the Chairman of the Subcommittee for five hours at a critical time when discussions had to be

made on an issue which was holding up an appropriations bill of more than \$140 billion.

On November 4, 2003, my staff called your office to request a meeting on the overtime issue with my offer to come to your office. You replied that you would prefer to come to my office and, as you know, we met privately one on one. It was my thought that such a private meeting would be the best way to break the impasse on the overtime issue. I was dismayed to read in CongressDaily on November 5:

"During a Tuesday meeting with Labor Secretary Chao, Specter offered to drop the amendment in exchange for the Administration 'backing away' from unrelated rules that would require unions to file more detailed financial disclosures known as LM-2 forms, sources said. Unions vehemently oppose both sets of rules. Chao rejected the offer."

As you know, I made no such offer.

My press secretary called CongressDaily repudiating that story and he called your press secretary saying that the CongressDaily story was false and noting that there were only two people in the meeting, you and I. Your office did not confirm my repudiation of the November 5th story.

On November 18, 2003, CongressDaily contained the following:

"Specter's office released a statement saying he is still seeking a compromise with the White House on the issue. But the statement denied an earlier report in CongressDaily that in a meeting with Labor Secretary Chao he had offered to drop the overtime provision in exchange for the Administration delaying new rules on union financial disclosure reports, known as LM-2 forms. However, several sources familiar with the early November meeting said otherwise."

Again, I am at a total loss to note that "several sources familiar with the early November meeting said otherwise," when only you and I were present. Again, your office did not confirm that I made no offer to drop the overtime amendment in exchange for the Administration backing away from LM-2.

I call these matters to your personal attention because of the importance of cooperation between the Secretary of an executive branch department and the Chairman of the appropriations subcommittee funding that Department if the public's business is to be appropriately carried out.

Sincerely,

ARLEN SPECTER.

SECRETARY OF LABOR,
Washington, December 2, 2003.

Hon. ARLEN SPECTER,
Chairman, Subcommittee on Labor-HHS Appropriations, U.S. Senate, Washington,
DC.

DEAR MR. CHAIRMAN: Thank you for your letter of November 24, as it affords an opportunity to clear up several issues of concern.

First, with regard to the proposed meeting on Thursday evening, I was out of the office and, as I understand from staff, there was no specific mention of a 7:15 p.m. meeting. I was therefore puzzled to learn that there were reports circulating that I had "cancelled" a meeting with you, when no meeting was ever scheduled. Needless to say, I would never do such a thing without good reason and direct communication between our offices.

Second, I can unequivocally assure you that no one from the Department of Labor gave any information to *CongressDaily* or other news sources concerning our November 4 meeting. In fact, our public affairs office strenuously denied the validity of the report in *CongressDaily* because, as we know, it was simply not true. You never made any offer to "trade" one regulatory item for another. I do not know why *CongressDaily* ran with the story, but I can assure you that the Department of Labor did nothing to encourage it or even suggest it. Moreover, as soon as the story appeared, our staff immediately contacted yours and offered to do everything possible to deflect any further stories in the same vein.

I regret any misunderstandings that may have been formed as a result of these incidents. I appreciate your leadership of the Labor-HHS-Education Appropriations Subcommittee and agree with you that it is essential that we work together to achieve the best possible policies that help our workforce.

Sincerely,

ELAINE L. CHAO.

Senator SPECTER. On the issue of that meeting, you responded that there were reports that you had "canceled" a meeting with me, which is not what my letter had said at all. The meeting was never set up. But we sought to have the meeting. Did you know that the four of us, the key appropriators controlling these seven appropriations bills in the omnibus, were seeking a meeting with you that Thursday evening?

Secretary CHAO. No, I did not. I did not receive that news. In fact, I think it would be quite foolish for any secretary to not go to a meeting with four of the appropriators there.

Senator SPECTER. Well, I happen to agree with you, that a secretary ought to go to a meeting with the chairman of the House and the chairman of the Senate full committees and the two sub-committees. But there we were on the Thursday night. You must have been aware that this critical matter was percolating at a very high boiling point.

Let me move on to Saturday, when I placed a call to you at 12:30.

Secretary CHAO. Saturday?

Senator SPECTER. Friday, November 21. And I got a response from you, which did not really deal with that at all. But a call came back at 5:30, when I was in Pittsburgh trying to find some way to talk to you to work through this issue, to see if we could find some compromise. Had you received a call from me at 12:30 on Friday, November 21?

Secretary CHAO. Well, Mr. Chairman, I pride myself on being very responsive. And I got back to you as quickly as I could. I did not know that you were in Pittsburgh at the time. But I did—

Senator SPECTER. I am not asking you if you knew where I was. What I am asking you, if you knew that there was a call to you at 12:30.

Secretary CHAO. I got the call as—as soon as I got word that you had called, I tried to return the phone call, yes.

Senator SPECTER. Well, let me try one more time. Did you know that there was a call at 12:30?

Secretary CHAO. No, I did not.

Senator SPECTER. You and I had met, Madame Secretary, one on one about this issue. And there was a report in the Congress Daily, which said that during a meeting between Secretary Chao and Senator Specter that I had offered to drop the amendment on regulations in exchange for the administration backing away from the LM2 rules. And you rejected the offer.

After I had issued a statement of denial, Congress Daily then came back on November 18 and noted my denial but said: "However, several sources familiar with the early November meeting said otherwise." My office issued a formal written statement denying that I had made any offer to you, which, first of all, is it not true that I did not make any offer to you to make an—

Secretary CHAO. I will attest to that.

Senator SPECTER. No deals, no stipulation, drop the regulation on LM.

Secretary CHAO. No, not at all.

Senator SPECTER. Did your office issue a written statement to Congress Daily straightening out the record and confirming my

written statement that no such proposal had ever been made by me?

Secretary CHAO. I do not know, but I will check on that. But as for—I do not know. But I also think that—

Senator SPECTER. Well, wait a minute, Madame Secretary.

Secretary CHAO. Yes.

Senator SPECTER. I wrote this to you back on November 24, outlining that in detail. How can it be that you do not know?

Secretary CHAO. I just asked my staff. And the answer I received was that a statement was not issued, but that phone calls were made. I think it is also worthwhile to point out that we had nothing to do with that story. If I had been a valuable source of any type, the coverage on this issue would certainly have been much better.

Senator SPECTER. Well, my time is up. So I will come back to this when my time resumes.

Senator Cochran has joined us.

Senator Cochran.

OPENING STATEMENT OF SENATOR THAD COCHRAN

Senator COCHRAN. Mr. Chairman, thank you very much. I am hopeful that this hearing can help identify the importance of the effort to modernize our pay and overtime rules. And I congratulate you, Madame Chairman, on undertaking that responsibility. I know it is a difficult challenge, because some come into consideration of that issue with preconceived notions that whatever proposal you make is going to be unfair to some people.

But as I understand the effort here, it is to give lower wage earners an opportunity to be in a position to earn overtime pay that they are not now getting. Is that part of the proposal that the Department has made?

Secretary CHAO. Yes. Right now, if you are a worker earning about \$8,060 a year, which is below minimum wage, you are not guaranteed overtime. If you are receiving overtime, it is only because your employer has agreed to give it.

So what we want to do is to help low wage vulnerable workers be guaranteed overtime and help about 1.3 million workers get the overtime that they deserve.

Senator COCHRAN. I was just with a couple of constituents of mine from Mississippi, who came up for a visit. And I told them that I was not able to meet with them as long as I had hoped to because of the hearing that was scheduled. And I wanted to come over and ask you about this.

I asked them if they had any views about the proposed change in the Department of Labor regulations on overtime pay. And they said, "Well, it is past due. It has been needed for a long time." They have a lot of professional engineers, who are employed, who are owners of the business. And they keep being—they are worried. They are concerned that unwittingly they are going to be in a situation where they are found to violate some rules, as currently interpreted and applied by some courts.

Is not another reason for the modernization of these rules to have businesses like those that were just visiting with me achieve a greater degree of certainty as to what the law is and what the

regulations are, so they can comply with them? They do not want to violate the rules.

But the way the law and the regulations have been interpreted, there is some confusion about what the obligations of some businesses are, treating professionals as wage earners. Is this another reason why the modernization effort has been undertaken by your Department?

Secretary CHAO. Absolutely. Class action lawsuits concerning white collar regulations now is the largest area of class action lawsuits in employment law, far surpassing discrimination lawsuits. Over \$2 billion a year are spent in needless litigation. And workers should be receiving their overtime sooner, but they are not, because there is no other mechanism sometimes except for the courts. And even the courts rule differently on issues, some of these issues.

So the best way to protect workers is to clarify the rules and regulations. If we, the Government, want to have—if the Government wants to really protect workers, we need to give certainty to the employers, so they know what their responsibilities are. And we also need to empower workers, so that they know what their rights are.

Senator COCHRAN. Well, I think this is a helpful hearing, so we can all understand better what the motivation is behind the proposed changes. The fact that Congress is trying intervene, I know that there was an effort made in the appropriations process to change the regulations or to modify them or to make them have no effect, null and void in some respects.

Well, I hope we will refrain from doing that and let the regular process work its way, as you have proposed. I think we will all be better off if we exercise that restraints and not overreact just on the basis of a few articles that have been written that might misrepresent in some respects what the intentions are and what the effects of the regulations will actually be.

Thank you for appearing before the committee today.

Secretary CHAO. Thank you.

Senator SPECTER. Senator Craig.

Senator CRAIG. Mr. Chairman, thank you. A couple more questions of the secretary.

I think one of the great frustrations that the private sector has is trying to deal with ambiguous or very lengthy, detailed regulation of the Federal Government. Bigger businesses hire fleets of attorneys that spend all of their time doing it and to do just exactly what Senator Cochran has suggested, be in compliance with the law, because they do not want to be obviously out of compliance.

It is my understanding that these regulations are not only sometimes very ambiguous, but there is a density to them that is in itself a physical fitness test. When an employee feels that he or she has been unfairly treated, what is their current recourse today? And what kind of time and expense might be involved in attempting to prove their case?

Secretary CHAO. Well, a lot of times they resort to the courts. And it takes about 3 to 4 years before they will get justice or they get their overtime paid. At the Department of Labor, if the rules and regulations are clear, we can help to recover back pay in about

108 days. That is about 3 months. So there is quite a lot of difference.

If the rules and regulations are clear, our own investigators can be better equipped to recover back wages. If the regulations are unclear and the courts cannot decide themselves, our investigators, the Department's investigators, are also not equipped fully to carry out the rules and regulations. Employers do not know what to do. Employees do not know what their rights are. It is very confusing.

Senator CRAIG. Who pays the legal bill?

Secretary CHAO. I think we all do, as a society. Because this \$2 billion in litigation fees can be better used to pay higher wages. And also, it can also be used, be better energy and effort used, to create new jobs.

Senator CRAIG. And the current estimate of legal bills in relation to this area of the law is how much?

Secretary CHAO. It is about \$2 billion.

Senator CRAIG. Annualized.

Secretary CHAO. Yes, annualized. And in addition, workers every year miss out about—workers every year miss out on about \$897 million in back wages.

Senator CRAIG. Thank you.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Craig.

Thank you, Madame Secretary, for moving ahead on this important issue. And let me associate myself with the remarks of Senator Craig and Senator Cochran on the desirability of having regulations which can be understood. And the issue of avoiding litigation is absolutely a matter of the highest priority.

I would like you to submit in writing to the subcommittee just how that is going to be accomplished. I would like to spend more time in going into detail on the discussion, but we have a very long list of witnesses. But if you take a look at the proposed regulation, which defines an administrative employee as someone who holds a position of responsibility defined either as, one, performing work of substantial performance or, two, performing work requiring a high level skill or training, how do we come to grips with the words substantial importance to avoid litigation? And how do we come to grips with the language of performing work requiring a high level skill or training? And how does that contrast with the current law, which has led to the litigation, stating "customarily and regularly exercises discretion and independent judgment"?

Then when we deal with professional employees, it is hard to distinguish the current regulation which calls for a knowledge of an advanced type in the field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction study contrasted with the proposed regulation reciting language advanced type in a field of science or learning, prolonged course of specialized intellectual instruction, and also the alternative is the existing regulation, an equivalent combination of intellectual instruction and work experience.

I would like you to submit to the subcommittee how there is an improvement and whether there might be a better course to tackle this with a commission such as the proposed legislation would call for. And then we would like answers in writing on the total num-

ber of comments you have had, 80,000 reputedly, according to the media, how many have been analyzed, and when you expect to have the final regulation. Will you meet the March 31 date? And how long do you anticipate the Office of Management will take to propose the final regs? So we have some idea.

I had asked you about this, but I did not get a specific answer as to what date we are looking at when this regulation is going to be final contrasted with September 30, which is what is asked for under the congressional move to delay this until the end of the fiscal year.

I want to be sure you had a full opportunity to answer the questions that I had asked you about issuing a statement. When my time is up, Madame Secretary, your time is not up. We do not want to limit you on the time of responding, if you had wanted to supplement your answer.

Secretary CHAO. We will be more than glad to submit the answers in writing. Let me just say a couple of things. One, this is a proposal. And we are in the process of evaluating the tens of thousands of comments. This rule is very complicated. It has not been updated. It needs to be updated so that workers can be protected.

Our intent is to strengthen overtime protection. We have a responsibility to clarify what the Government requires and what the Government is asking of employers. And employees need to know what their rights are, as well.

As for the timing, we think that this has been ongoing for quite a long time. There was a great deal of work done before the issuance of the proposal. There were stakeholder meetings. There were all sorts of discussions. We are now through the issuance of the rule, the proposal of the rule. And we have received tens of thousands of comments. We are going through that very carefully. And our goal is to move on this again, so that we can protect workers who are now losing out on overtime protection.

Senator SPECTER. Well, we certainly do respect your responsibility, Madame Secretary. No doubt about it. As you have articulated, advances made by the Bush administration in the employment field at the opening part of your statement. And we would appreciate your addressing in writing the issue about whether there will be a loss in compensation as contended. I know you will have people here to monitor the testimony which will follow. If you had the time, it might be desirable for you to stay. There might be something you would care to add at a later point.

While we respect your responsibility, the congressional responsibility is one of oversight of administrative regulations.

Secretary CHAO. Thank you.

Senator SPECTER. We thank you for joining us today. And we concur. I think there is a unanimity of agreement that we need to have regulations which are understood to avoid litigation.

Secretary CHAO. Thank you very much, Mr. Chairman.

ADDITIONAL COMMITTEE QUESTIONS

Senator SPECTER. There will be some additional questions which will be submitted for your response in the record.

[The following questions were submitted to the Department for written responses:]

RESPONSES OF SECRETARY CHAO TO COMMITTEE QUESTIONS

Question. Please explain how changes to the FLSA Part 541 regulations will decrease litigation so that workers will not have to fight for years in federal court to receive their overtime pay.

Answer. Because the duties tests for exemption in the regulations have not been updated in over 50 years, the regulations do not reflect a significant body of federal case law or long-standing Wage and Hour Division (WHD) enforcement policies as set forth in WHD opinion letters and the Field Operations Handbook. In the last 50 years, there have been significant legal developments on issues such as concurrent performance of exempt and nonexempt duties, the use of reference manuals, and the “production versus staff dichotomy” for the administrative exemption. Significant and sometimes conflicting court decisions have also been issued on particular occupations such as retail assistant managers, insurance claims adjusters, public sector employees and journalists. None of these developments are reflected in the current regulations, thereby generating confusion, uncertainty, inconsistent results, and excessive litigation.

The final regulations will use clearer and more precise language to reflect the rulemaking record, current federal case law (resolving conflicts between cases when necessary) and WHD enforcement policies. By doing so, the public will have one set of transparent rules to follow, consistent with existing law, and thus will not have to rely as much on attorneys to understand their legal rights and responsibilities through the conduct of extensive legal research from a multitude of sources. Ensuring the regulations accurately reflect current law, and reconciling conflicting court decisions, should reduce litigation.

For example, the current regulations contain no discussion of the exempt status of police officers, fire fighters, paramedics, emergency medical technicians or other first responders. There is, however, a significant body of federal court decisions providing that most such employees are not exempt administrative or professional employees, although courts have found that chiefs, captains and some lieutenants can qualify as exempt executives. The Department had no intent to change this interpretation of the law, but the public commentary indicates that more clarity is needed on this issue.

Question. The proposed regulation defines an administrative employee as someone who holds a position of responsibility, which is further defined as (1) performing work of substantial importance or, (2) performing work requiring a high level skill or training. How will using these new phrases “substantial importance” and “high level of skill or training” avoid litigation? How does this contrast with the current regulations which require the exercise of “discretion and independent judgment?”

Answer. In meetings held by the Department of Labor prior to drafting the Notice of Proposed Rulemaking, employer stakeholders identified the administrative exemption, and particularly the “discretion and independent judgment” standard, as one of the most confusing and difficult requirements in the regulations. A review of case law reveals that federal courts also have difficulty interpreting and applying this standard. Accordingly, the Department attempted to propose an alternative standard that would be easier to understand and apply.

Comments received by the Department indicate that we were not fully successful in this effort. Both employer and employee commenters have expressed concerns about the proposed test. Most commenters request that the Department bring back the “discretion and independent judgment” test, although they disagree sharply on whether it should be a requirement, or one of several alternatives, for exemption as an administrative employee.

In response to these valid concerns, when the Department issues the final rule, it will reflect significant changes from the proposal. As stated above, the Department will rely on existing federal case law, opinion letters, comments received during the comment period, and other WHD policy statements to provide regulatory language that will be easier for both employers and employees to understand and apply. It is not the Department’s intent to depart significantly from current law.

Question. When dealing with professional employees it’s difficult to distinguish between the current regulation that calls for “a knowledge of an advanced type in the field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study,” and the proposal’s language, “advanced type in the field of science or learning or a prolonged course of specialized intellectual instruction”. I would like you to submit to the subcommittee how there is an improve-

ment and whether there might be a better course to tackle this with a commission such as the proposed legislation would call for.

Answer. The professional exemption has been the focus of much misinterpretation during the course of this rulemaking. Section 541.301(a) of the current regulations provides that a learned professional is an employee whose work requires “knowledge of an advanced type in a field of science or learning *customarily* acquired by a prolonged course of specialized intellectual instruction and study.” (Emphasis added.) However, current section 541.301(d) states that, while the word “*customarily*” implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession,” it also “makes the exemption available to the occasional lawyer who has not gone to law school or the occasional chemist who is not the possessor of a degree in chemistry.”

The proposed changes to section 541.301 were intended to clarify the point at which the “occasional chemist” who does not have a degree can qualify as a professional. The proposal states that such an employee (to qualify as a professional) must have the same knowledge as the degreed employee even if that knowledge was acquired by an alternative, nontraditional means. The Department intended to clarify that an employee who has the same knowledge, same skills, and performs the same work as the degreed employees working in a professional field should be classified and paid in a similar manner.

Department officials have stated repeatedly that we do not intend to make any changes to the educational requirements for the professional exemption. Many of the specific concerns—about nurses, engineering technicians and veterans, for example—arise from the presumption that we are making major changes to the educational requirements. The Department intends to clarify the final regulation to ensure no misinterpretation of our intent.

The Department does not believe a commission would provide any information or ideas not already included in the 75,280 comments received during this rulemaking. This rulemaking has been on the Department’s regulatory agenda for 20 years, and already has been studied by GAO. Further delay will mean that millions of workers will continue to be denied overtime pay.

Question. We would like answers on the total number of comments received, media reports say 80,000. How many have been analyzed? When do you expect to have the final regulation? Will the March 31, 2004, deadline be met? How long do you anticipate the Office of Management and Budget will take to review the final regulations? Contrast that date with the September 30, 2004, deadline that has been requested in congressional moves to delay this to the end of this fiscal year.

Answer. The Department received a total of 75,280 comments during the official comment period. We have analyzed all of them. The Department will publish a final rule as expeditiously as possible, consistent with the requirements of a process governing a significant, complex rule such as this one. The Department intends to submit a final rule to OMB in March; we are not in a position to comment on OMB’s review process. We believe that the final rule will meet Congress’ expectations for both thoroughness and thoughtfulness. As stated above, we believe that a delay to September 2004 would be harmful to workers, especially low-wage workers who today can be denied overtime if they earn only \$8,100 per year.

Question. In your statement, you articulated advances made by the Bush Administration in the employment field. What are those? Could you also discuss whether there will be a loss in compensation as contended?

Answer. The Department intends to make every effort in the final regulations to ensure that no low-wage or middle-income employees lose overtime pay or experience a decline in compensation.

The Bush Administration is committed to protecting America’s workers, and the Department of Labor has backed up this commitment with action. Almost every law enforcement agency in the Department posted record performance results in fiscal year 2003:

- The Wage and Hour Division collected over \$212 million in back wages for over 340,000 employees, an 11-year high and a 60 percent increase over fiscal year 2001.
- OSHA cited employers for 83,760 violations, a nearly 8 percent increase over fiscal year 2002. Almost 60,000 of those violations were considered serious, an 11 percent increase.
- Workplace injuries and fatalities fell to the lowest point ever in 2002.
- Fatalities in all mines decreased by 10 percent in fiscal year 2003, and total mining injuries fell by 12 percent.
- The Employee Benefits Security Administration had record monetary results of more than \$1.4 billion in fiscal year 2003, a nearly 60 percent increase over the previous year.

STATEMENT OF RICHARD L. TRUMKA, SECRETARY-TREASURER, AFL-CIO

Senator SPECTER. We will now turn to the second panel, which will be the Secretary-Treasurer of the AFL-CIO, Richard L. Trumka, esquire. Mr. Trumka was first elected in 1995, the youngest secretary-treasurer in AFL-CIO history, a third generation coal miner from Nemacolin, Pennsylvania, a graduate of Penn State with a law degree from University Law School.

We are now going to call the other witnesses. I called the second panel of just Mr. Trumka. So if you others would step back, we will call you.

Mr. Trumka, would you move to the center, please?

Mr. Trumka has a very unusual background as a coal miner after he became a lawyer, which perhaps put an appropriate perspective on the skill levels and social utility of the respective professions.

I am going to withhold further comment on the characteristic stories about lawyers' compensations. But we welcome you, Mr. Secretary-Treasurer of the AFL-CIO. And the floor is yours.

Mr. TRUMKA. Thank you, Mr. Chairman and members of the committee. Thank you for inviting me to testify on behalf of the AFL-CIO regarding the Bush administration's proposed regulations on overtime eligibility.

The overtime regulations proposed by the Bush administration in March 2003 would redefine 8 million workers as ineligible for Federal overtime protection. In addition, under this proposal thousands more workers every year would be stripped of their overtime rights. The Bush proposal would effectively gut the 40-hour workweek through administrative regulation, dishonoring the sacrifice of thousands of working women and men, who struggled for over a century to enact the Fair Labor Standards Act of 1938.

It would also dishonor the sacrifice of millions of working parents today, who work longer hours to provide for their families. And it would be a slap in the face to working parents in desperate need of more family time away from work.

Mr. Chairman, this hearing could not be more timely for today the 40-hour workweek is in jeopardy. A vote scheduled for this afternoon in the Senate could determine the future of overtime protection and the 40-hour workweek in this country.

There are seven points that I would like to make about the Bush overtime proposal and today's vote in the Senate. First, it bears repeating that the one and only overtime issue before Congress is a very simple one, whether the Bush administration should be allowed to strip workers of their overtime rights.

Contrary to assertions by the Department of Labor, nobody has proposed stopping the Department from issuing a regulation. No one has proposed stopping DOL from updating, clarifying or improving the overtime regulations. And no one has proposed stopping DOL from making an inflation adjustment that would expand overtime coverage to a small number of lower income workers.

The only thing anyone in Congress has proposed is an amendment to stop the Labor Department from stripping workers of their overtime rights. That is all the Harkin amendment does. The Harkin amendment would allow the DOL to issue a regulation accom-

plishing all the things the Department says it wants to do, so long as it refrains from stripping workers of their overtime rights. So DOL should stop hiding behind excuses.

Second, the administration's detailed descriptions of ways employers can avoid paying anything for overtime work, as reported recently by several news organizations, I think are revealing of its true priorities, providing a primer of how to lower employees' wages in order to save money on overtime. Whether these strategies are actually legal or not is hardly consistent with the administration's pressed concern for the overtime earnings of low income workers.

In fact, these proposed rules were designed for the benefit of employers, not workers. And that is not just my opinion. But it is also the opinion of the business community. As one prominent management law firm informed its clients when the proposed regulations first came out, and I quote, "Thankfully, virtually all of these changes should ultimately be beneficial to employers."

Third, we believe the Bush administration has grossly miscalculated the effects of its proposal in ways that make its overtime cuts look smaller. The administration's estimates low-ball the number of workers who would lose their overtime eligibility and inflate the number of workers who would gain.

In one sense, of course, the administration's misleading estimates are beside the point. Whether the actual number of workers losing overtime is 700,000, 7 million, 8 million, or 20 million, there is no excuse for taking overtime protection away from any worker. And if DOL's estimates are right, if they are correct, it is all the more reason for them to support the Harkin amendment because it would affect, in their opinion, so few people. So to stop the logjam, they should support the amendment.

Also, the number of low income workers who would benefit from the proposed inflation adjustment is irrelevant to the debate in Congress. Again, the Harkin amendment would allow the administration to extend overtime coverage to any number of workers, whether it be 300,000, 1.3 million, or whatever number of workers would benefit from a more complete adjustment for inflation.

Fourth, while no worker deserves to lose overtime eligibility, it is particularly reprehensible for the administration to propose stripping overtime rights from veterans who have received technical training in the military. Under the Bush proposal, if an employer determines that the training veterans have received in the military is equivalent to a 4-year professional degree, that employer will now be allowed to deny those veterans overtime eligibility and refuse to pay them anything for overtime pay. This proposal is not only offensive, it actually insults the men and women who risk their lives and serve their country.

It also threatens to undermine a key recruiting tool of the armed services. That is the opportunity for career advancement through military training. In a regulatory proposal brimming with bad ideas, this is certainly one of the worst. And this is surely not the way to show support for our troops.

Fifth, the Senate vote this afternoon may be the last chance for Congress to protect the overtime rights of 8 million workers and more broadly to protect the future of the 40-hour workweek.

Mr. Chairman, has my time expired?

Senator SPECTER. It has. You are about a minute over time, if you—

PREPARED STATEMENT

Mr. TRUMKA. I apologize. I can only say that I would like to thank the chairman, give my personal gratitude to the chairman, for his vote in favor of the Harkin amendment and hope that we can count on his continued support for guaranteeing American workers the loss of their overtime rights. And I thank you very much for the opportunity to be here.

[The statement follows:]

PREPARED STATEMENT OF RICHARD L. TRUMKA

Mr. Chairman, members of the Committee, thank you for inviting me to testify on behalf of the AFL-CIO regarding the Bush Administration's proposed regulations on overtime eligibility.

The overtime regulations proposed by the Bush Administration in March 2003 would redefine 8 million workers as ineligible for federal overtime protection. In addition, under this proposal, thousands more workers every year would be stripped of their overtime rights. The Bush proposal would effectively gut the 40-hour workweek through administrative regulation, dishonoring the sacrifice of thousands of working men and women who struggled for over a century to enact the Fair Labor Standards Act (FLSA) of 1938. The Bush proposal would also dishonor the sacrifice of millions of working parents today who work longer hours to provide for their families, and would be a slap in the face to working parents in desperate need of more family time away from work.

Mr. Chairman, this hearing could not be more timely, for today the 40-hour workweek is in jeopardy. A vote scheduled for this afternoon in the Senate could determine the future of overtime protection and the 40-hour workweek in this country.

There are seven points I would like to make about the Bush overtime proposal and today's vote in the Senate:

First, it bears repeating that the one and only overtime issue before Congress is a very simple one: whether the Bush Administration should be allowed to strip workers of their overtime rights. Contrary to assertions by the Department of Labor (DOL), nobody has proposed stopping the Department from issuing a regulation. No one has proposed stopping DOL from updating, clarifying, or improving the overtime regulations. No one has proposed stopping DOL from making an inflation adjustment that would expand overtime coverage to a small number of lower-income workers. The only thing anyone in Congress has proposed is an amendment to stop the Labor Department from stripping workers of their overtime rights. That is all the Harkin amendment does. The Harkin amendment would allow DOL to issue a regulation accomplishing all the things the Department says it wants to do, so long as it refrains from stripping workers of their overtime rights. DOL should stop hiding behind phony excuses. The indisputable fact is that this Administration is pulling out all the stops to insist on its right to take away workers' overtime.

Second, the Administration's detailed descriptions of ways employers can avoid paying anything for overtime work, as reported recently by several news organizations, are very revealing of its true priorities. Providing a primer on how to lower employees' wages in order to save money on overtime—whether these strategies are actually legal or not—is hardly consistent with the Administration's professed concern for the overtime earnings of low-income workers.

In fact, these proposed rules were designed for the benefit of employers, not workers. This is not just my opinion, but is also the opinion of the business community. As one prominent management law firm (Proskauer Rose) informed its clients when the proposed regulations first came out, "Thankfully, virtually all of these changes should ultimately be beneficial to employers."

Third, we believe the Bush Administration has grossly miscalculated the effects of its proposal in ways that make its overtime cuts look smaller. The Administration's estimates lowball the number of workers who would lose their overtime eligibility and inflate the number of workers who would gain eligibility. In one sense, of course, the Administration's misleading estimates are beside the point. Whether the actual number of workers losing overtime is 7 million or 8 million or 20 million, there is no excuse for taking overtime protection away from any worker. And the

number of low-income workers who would benefit from the proposed inflation adjustment is irrelevant to the debate in Congress. Again, the Harkin amendment would allow the Administration to extend overtime coverage to any number of workers, whether it be 300,000, 1.3 million, or whatever number of workers would benefit from a more complete adjustment for inflation.

Fourth, while no worker deserves to lose overtime eligibility, it is particularly reprehensible for this Administration to propose stripping overtime rights from veterans who have received technical training in the military. Under the Bush proposal, if an employer determines that the training veterans have received in the military is equivalent to a four-year professional degree, that employer will now be allowed to deny those veterans overtime eligibility and refuse to pay them anything for overtime work. This proposal is offensive. It is an insult to the men and women who risk their lives to serve their country. It also threatens to undermine a key recruiting tool of the armed services—the opportunity for career advancement through military training. In a regulatory proposal brimming with bad ideas, this is certainly one of the worst.

Fifth, the Senate vote this afternoon may be the last chance for Congress to protect the overtime rights of 8 million workers, and more broadly to protect the future of the 40-hour workweek. The Labor Department has announced its plan to issue a final regulation by March 2004. Time is running out. If an overtime guarantee is not included in the omnibus appropriations bill now before the Senate, there may be no way to stop the Administration from stripping overtime rights from more than 8 million workers. It is urgent and imperative that Congress defeat cloture this afternoon to force the Administration to abandon its campaign to restrict overtime eligibility.

Sixth, responsibility for jeopardizing the omnibus spending legislation now before the Senate lies squarely with the Bush Administration. It was the Bush Administration that threatened to veto this legislation if it included the Harkin overtime guarantee. It was the Bush Administration that forced the conference committee to strip out the Harkin overtime guarantee. It was the Bush Administration that refused even to sit down and discuss a compromise with the distinguished chairman of this committee. It was the Bush Administration that flouted strong bipartisan votes in both the House and Senate in favor of protecting workers' overtime rights. And it was the Bush Administration that recklessly disregarded repeated public warnings that stripping the Harkin overtime guarantee from this bill could jeopardize its final passage.

Seventh, it is within the Administration's power to resolve this standoff. If the Administration agreed to respect the will of bipartisan pro-overtime majorities in both houses of Congress, the Harkin overtime guarantee could be reattached to an omnibus package. Alternatively, if the Administration withdrew its opposition to protecting overtime, the Harkin overtime guarantee could be enacted separately. Or the Bush Administration could simply withdraw its controversial overtime cuts, make a public commitment not to restrict overtime eligibility in the future, and immediately implement the non-controversial part of its proposal that adjusts overtime salary tests for inflation.

Finally, I would like to express my personal gratitude to the chairman for his vote in favor of the Harkin amendment. I hope we can count on the chairman's continued support for guaranteeing America's workers against the loss of their overtime rights.

Thank you, and I would be glad to answer any questions.

Senator SPECTER. Thank you, Mr. Trumka.

You have specified in the opening part of your statement that there will be a redefinition of 8 million workers as ineligible for Federal overtime protection. You go on to say that thousands more workers every year would be stripped of their overtime rights.

In the context that we do not yet have a final regulation, what is the evidentiary base for your first conclusion as to the 8 million workers who would be stripped of their overtime rights?

Mr. TRUMKA. It was based on the proposal that was issued and an analysis by the Economic Policy Institute.

Senator SPECTER. Well, can you amplify that, as to how they come to that conclusion and how much money would be involved in the losses?

Mr. TRUMKA. Well, Mr. Bernstein will be here in a little while on the second panel. He conducted the study. And he can give you

the detail of it. If you would like, I can give to you a detailed written analysis of that study.

In addition, the second part of the study about thousands more in the future being affected works two ways. The new regs will index the top level and the bottom level. They put a top level for overtime. It is \$65,100, I believe. If you go over that, you are presumed to lose overtime. They do not index that figure for inflation. So each year, as raises take people over the \$65,000, they will lose overtime.

Also, they do not index the bottom level of \$22,000. So as people's raises take them over the \$22,000 level, they profess that more people will lose overtime as their wages go beyond \$22,000.

Senator SPECTER. Mr. Trumka, you were present during the course of my questioning Secretary Chao, where I commented on the proposed regulation and the current law as to administrative employees, as to the difficulty of the definition. And the current proposal is for an administrative employee performing work of substantial importance or performing work requiring a high level of skill or training. Do you have a specific proposal as to how you can structure a regulation which would provide clarity to avoid litigation?

Mr. TRUMKA. Well, the first thing we do with any proposal, Mr. Chairman, is to specify, as clearly and as concisely and as bindingly as possible, the goal. If the goal is to help workers, then the Harkin amendment will help them do that, because what it will not allow them to do is change definitions so they can be interpreted to eliminate or deny people overtime. Then you could start with specificity.

You know, over the years we have had litigations. So the current regs are fairly well understood. And one of the previous witnesses that was with the Secretary of Labor said the new or proposed regulations would result in a deluge of litigation because of the words that you just talked about, substantial, high level. Those are a lawyer's dream. Those are the fudge words that everybody uses and will result in another 15 years of litigation to define those out into the future.

Senator SPECTER. Well, Mr. Trumka, beyond the issue of whether it is going to help one group or another, do you agree that we ought to have definitions which avoid litigation? And I know the answer to the question, but just to put that on the record, there is no doubt that it is a common objective. When there is litigation, there are expenses on all sides. Do you concur that we really need regulations which would advance the interest of avoiding litigation?

Mr. TRUMKA. Yes, sir. I do agree, Mr. Chairman, that we should avoid litigation. However, if we are going to have definitively, I would have them definitely provide overtime, as opposed to definitely not provide overtime. I would fight any regulation that took overtime away from a substantial number of workers.

But I agree with the goal of eliminating costly litigation, so long as, when we are being definitive, it definitively provides overtime and not definitively takes overtime away.

Senator SPECTER. Well, Mr. Trumka, how is overtime taken away on the proposed regulation contrasted with the current regulation, where the current regulation defines a professional employee as

someone performing work requiring knowledge of an advanced type in the field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, and contrast that language with the proposed regulation, advanced type in the field of science or learning using language specialized intellectual course, and then as an alternative, the equivalent combination of intellectual instruction and work experience?

It looks very difficult to me to draw a distinction between those two definitions. Am I missing something here?

Mr. TRUMKA. Well, those two definitions, the second one is far more nebulous and gives far more discretion to employers to define what equivalent means, things of that sort.

The other thing is, you and I both know, Mr. Chairman, that as lawyers, when words are litigated, they take on a meaning. And the courts give meaning to all those terms in the first definition that you gave. They have been defined. Now you change one word, eliminate a word, add a word, there will be another series of litigation that will redefine what all of those things meant. And so long as we are going to do that, if you can assure or we can assure the American worker that the redefinition is not going to take away overtime, but is going to add overtime, we will be helpful. We will do what we can to help that happen.

What we will not tolerate is seeing a bad economic policy with an economy that is two-thirds driven by consumer spending. Taking upwards of \$3 billion to \$4 billion out of the pockets of average Americans and putting it somewhere else is not a good economic policy.

Senator SPECTER. Well, the question is whether we could redefine the regulations so that we leave people in their current status, so it does not have an impact one way or another, not giving an advantage to either side, but maintaining the current level of compensation with language which would avoid litigation. And that is the objective that I would like to come to, so that you do not create an imbalance in where you stand now as to what people are earning but seek to avoid ambiguous language, which leads the courts to make constructions on it.

Well, I do not know that we are going to advance that cause very much here. But when I looked at the proposed reg and I looked at the old reg, it seemed to me that the ball was not advanced on limiting litigation. I would like to limit litigation. And let the record show the witness is nodding in the affirmative. I do not think it does that.

Mr. TRUMKA. I agree with you. It does not.

Senator SPECTER. I am going to be interested to hear the next witnesses as to how you make the computation that labor loses. On this language, I do not know that you can pick winners or losers, because I do not know that you can pick what a court is going to say on this language.

Mr. TRUMKA. Well, some of the things you definitely cannot. But \$65,100 is real easy to interpret. Taking away the long test and having only the short test is really easy to interpret. Maybe on one specific thing you cannot pick winners and losers. But when you look at the whole thing, you can definitely pick winners and losers.

Employers win and workers lose. And there is not a doubt in my mind about that.

Senator SPECTER. Well, that is a valid consideration. That is the first time I have heard the figure articulated in this hearing. I know of a figure, but that is the first I have heard of it.

Well, thank you very much, Mr. Trumka.

Mr. TRUMKA. Thank you, Mr. Chairman.

Senator SPECTER. Thank you for coming and joining us here today.

Mr. TRUMKA. Thank you for the hearing.

Senator SPECTER. We will now go to panel three: Mr. David Fortney, Mr. Jared Bernstein, Mr. Ronald Bird, Mr. Andrew J. McDevitt, and Ms. Patty Hefner.

STATEMENT OF DAVID S. FORTNEY, CO-FOUNDER, FORTNEY & SCOTT

Senator SPECTER. Our first witness on this panel is Mr. Fortney, David S. Fortney, who is co-founder of Fortney & Scott, a Washington, D.C.-based firm specializing in labor and employment issues. Before co-founding the firm, Mr. Fortney held several positions with the U.S. Department of Labor, including acting solicitor of labor and chief legal officer. He has a bachelor's degree from Penn State and a JD from Duquesne University School of Law.

Are you a Pennsylvanian, as well as—

Mr. FORTNEY. I am indeed, Mr. Chairman.

Senator SPECTER [continuing]. A background in your schooling in Pennsylvania?

Mr. FORTNEY. I am indeed. And I just spent the weekend there with my parents.

Senator SPECTER. Thank you for joining us, Mr. Fortney. And the floor is yours.

Mr. FORTNEY. Thank you and good morning. It is a privilege to appear before you this morning, Mr. Chairman, regarding the proposed overtime regulations. I am appearing on behalf of a broad-based employer coalition known as the OT Overtime Coalition. This coalition is comprised of more than approximately 100 trade associations, companies, and professional human resource organizations. And together the coalition represents 2.4 million employers and over 42 million employees.

At the outset, let me state that we really would like to thank you, Mr. Chairman and members of this subcommittee, for convening this important hearing today. We believe that it is very important that we have an honest and informed dialogue about these proposed regulations and what would happen and what would not happen if the regulations, at least as proposed, would become final.

I think that although there may be some disagreement on this point, but I think there is at least a consensus that the proposed regulations would make many changes that are desperately needed. The current regulations are outdated. They cause confusion and uncertainty among all stakeholders, including employers, employees not knowing what their rights are, and including the Labor Department, who is charged with enforcement. I think the other witnesses have covered that.

So what we have today is the existing regulations designed for a 1950s workforce making 1970s salaries. The rules are out of date.

And they produce nothing but confusion and litigation. I think there is agreement on that.

Initially, I would like to share, if I could, please, why the overtime regulations need to be updated. There is, again, the GAO report. The secretary has cataloged many of the prior looks at the regulations, all reaching the same conclusion. But what specifically, why are there problems with these regulations? Let me see if I can provide some examples to illustrate in the real world what is going on with these regulations.

The current regulations, which again were promulgated about half a century ago, list a number of occupations that were put in there so that people could read the regulations and understand, should an employee get overtime or not get overtime. The examples that are listed in the regulations are largely wholly out of date and unhelpful today.

For example, straw bosses, gang leaders, keypunch operators. These occupations no longer exist. No member of this subcommittee, I would suggest, will find those occupations in their home states. We do not have them with our clients. And so in contrast, how do we take these antiquated occupations in the current regulations and align them when clients come and ask us: Who is the software engineer? Is that person exempt or nonexempt? Network administrator, a web master.

Now these are the jobs where—job creation that is making our economy grow. And the lack of clarity that we are suffering from today with these regulations result in unfairness to everyone involved. This needs to be addressed.

But it is not just the job titles. The regulations go further and say: You do not look at titles, but you have to look at what people actually do.

Let me see if I can give one example that supposedly is there to help us understand the distinction between who is exempt and nonexempt. Our current regulations tell us that employees who watch machines and keep an eye out for trouble, those can be exempt employees from overtime. However, if an employee watches a machine, if they operate—to see if they “operate properly,” that person is not supposed to be exempt. I, frankly, have never been able to divine what the distinction is. And in the real world, people cannot. This is a huge problem in the practical world.

Now, what has happened? There has been some reference to the litigation. I think the Secretary of Labor cataloged what has happened with that record. Let us talk about what some of these cases have done, the results that just do not seem sensible. I think the average human resource professional, the small business administrator would not accurately read these regulations and does not often.

A court found that a project superintendent earning \$90,000 a year as a salary was nonexempt because he performed staff functions. In the court’s reasoning, they found that he was a production employee. He was producing construction management. That is not helpful.

Another court found that network communications specialists, all of whom had advanced degrees in physics, mathematics, engineering, many of whom on their surface, many of us would look at say

those are certainly professionals, were ruled not to be because they followed manuals and made group decisions.

I see my time is up, Mr. Chair. I just want to close by noting that the lack of—

Senator SPECTER. If you need a little more time to summarize, go ahead and take it, Mr. Fortney.

Mr. FORTNEY. I appreciate that. Thank you.

The lack of clarity in these regulations operates unfairly. Realistically, a typical human resource representative, a small business owner—there was reference before, Senator Cochran talked about the density of the regulations. They are dense. They are not fair. They do not work well.

What we need are regulations that help with that. Are the proposed regulations perfect? No. And that—you have asked a number of questions probing what their effect would be. But what we know for certain is that the current regulations are broken. They need to be fixed.

PREPARED STATEMENT

I do not know nor, with due respect, does anyone know what the final regulations will look like. We await those results. We know that if there are problems, that there are a number of remedies that are available: Judicial review, congressional review, as this Congress did with the economic regulations. So we are not, if you will, stuck with them either. But it is a start. A concern, respectfully, is that the delay in addressing these issues, although not perfect, would be a step forward.

With that, I thank you.

[The statement follows:]

PREPARED STATEMENT OF DAVID S. FORTNEY

Mr. Chairman, Members of the Committee. My name is David Fortney and I am a co-founder of the law firm Fortney & Scott, LLC in Washington, DC. I am testifying today on behalf of a broad group of employer associations, employers and other organizations that are united by their mission of working for fairness and clarity in overtime laws. The coalition represents employers of every size and in every state and covers many sectors of the U.S. economy, including small business, retail, manufacturing, financial services and insurance, education, and other areas. While I am here today on behalf of the employer coalition, my testimony also reflects my experience as a practicing labor and employment attorney for twenty four years, as well as my previous experience at the U.S. Department of Labor, where I served as the Deputy Solicitor and Acting Solicitor during the first Bush Administration, under Secretaries of Labor Elizabeth Dole and Lynn Martin. In my positions at the Labor Department, my responsibilities included the interpretation and enforcement of the Fair Labor Standards Act of 1938, as amended (“FLSA”), and the regulations implementing the FLSA, including the regulations that are the focus of today’s hearing that provide for exemptions from overtime and minimum wage for “white-collar” jobs, including executive, administrative and professional positions. Moreover, I have extensive experience counseling employers who seek to comply with the FLSA white-collar regulations, and experience responding to the growing number of class action claims being filed against employers. I will discuss my experience and views on these matters in the context of the proposed revisions to the white-collar exemption regulations.

INTRODUCTION AND OVERVIEW OF THE FLSA WHITE-COLLAR EXEMPTION REGULATIONS

The white-collar exemption regulations are dramatically outdated and have imposed significant confusion and uncertainty in determining who is, and who is not, exempt from the FLSA’s minimum wage and overtime requirements. The FLSA imposes minimum wage and overtime requirements on covered employers, but also, in

29 U.S.C. § 213 (a), provides certain exemptions from these requirements. Section 213 (a) states that the minimum wage and overtime requirements shall not apply to any employee employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson. As you know, the regulations for implementing these statutory exemptions—commonly referred to as the “white-collar” exemptions—are codified at 29 CFR Part 541. The white-collar exemption regulations impose two requirements for a job to be classified as exempt. First, the employee must be paid on a salary basis and at the required salary level. And, second, the job duties must involve managerial, administrative or professional skills.

**THE WHITE-COLLAR EXEMPTION REGULATIONS ARE OUTDATED AND REQUIRE
COMPREHENSIVE REFORM**

The problem that all stakeholders face today, including employers, employees and the Labor Department, is in trying to apply the outdated regulations to today’s workplace. The duties tests were last modified in 1949—over 50 years ago, and have remained essentially unchanged since that time. The salary basis was added to the regulations in 1954, and was last updated in 1975—over 25 years ago. As a result, the long-outdated requirements create uncertainty and frustrate compliance efforts. For example, the “long test” for determining whether an employee is exempt from the overtime provisions of the statute is currently triggered by a weekly salary of only \$155, a figure so out-of-date that it renders the long test meaningless. Virtually every salaried employee earns more than \$155 per week and is therefore potentially outside the overtime protections of the law. Indeed, if an employee is paid the minimum wage of \$5.15 per hour, which equals \$206 for a 40-hour workweek, the long test is met. Moreover, the alternative salary test of \$250 for highly compensated exempt employees (the “short test”) is nearly met with the minimum wage and, as a practical matter, is not a useful tool. The only remaining issue for salary typically is whether there have been improper deductions or impermissible partial day “dockings” of compensation.

Therefore, as a practical matter, because of the general obsolescence of the salary test, typically the evaluation of whether jobs properly are classified as exempt primarily turns on the duties requirements. The duties tests, however, have proven to be a vast “gray” area, because the current regulations are too vague. As a result, both employers and the Labor Department are faced with inconsistent results that often are no more certain than the next court decision. In particular, the administrative exemption’s requirements, which require exempt employees to perform “staff” rather than production or sales work, and exercise “discretion and independent judgment” on important matters in managing the employer’s general business operations, are particularly difficult to apply. For example, a court ruled that a project superintendent, who supervised three large construction projects for a construction management company, earning an annual salary of \$90,000, was not an exempt administrative employee. The court reasoned that under the staff versus production dichotomy, the employee “produced” construction project management and thus was a nonexempt production employee. See *Carpenter v. R.M. Shoemaker Co.*, 2002 WL 987990, 7 Wage & Hour Cas. 2d (BNA) 1457 (E.D. Pa. May 6, 2002). Similarly, the professional exemption was found not to apply to “network communications specialists” who had advanced physics, mathematics and engineering degrees and who trained mission control personnel, because, the court held, the employees failed to exercise discretion, because they used technical manuals and made group decisions. *Hashop v. Rockwell Space Operations*, 867 F. Supp. 1287 (S.D. Texas 1994).

The result is that the current vague regulations result in “gotcha” liabilities and unintentional noncompliance. The significant increase in employment claims is a clear indication that the current rules are not working—why should we have escalating claims when the rules have not changed? Wage and hour class actions now are the most frequently filed class action claims employers face, and individual wage and hour lawsuits doubled in 2002.

In my experience, the explanation for these unacceptable developments is simple—plaintiffs’ lawyers have discovered that the outdated regulations provide an excellent basis for filing “gotcha” claims that primarily benefit the attorneys. Moreover, under the current outdated rules, employers often are required to secure expensive legal guidance on what is required to secure compliance, and even then the best that typically can be provided is somewhat guarded advice. As one of our clients once asked me, why should extensive good faith compliance efforts have the same feel as spinning a roulette wheel?

Everyone, perhaps with the exception of a small cadre of plaintiffs’ lawyers who are making huge fees in filing these wage and hour class action lawsuits, agrees

that the outdated regulations require revision, because the rules are vague and ambiguous and difficult to apply to many positions in today's workplace. The U.S. General Accounting Office ("GAO") review of regulations in 1999 recommended that the Secretary of Labor comprehensively review and make the necessary changes to the white-collar regulations to better meet the needs of both employers and employees in the modern workplace and to anticipate future workplace trends. The GAO's recommendations recognized the problems in achieving compliance. My personal experience has been that it often is difficult to advise employers because the rules are not clear. Additionally, the judicial interpretations vary and compound the problems in securing compliance. Moreover, it is my belief, based on my personal experience, that these same factors pose challenges to the Labor Department in securing uniform and consistent enforcement.

CONGRESS SHOULD ALLOW DOL TO COMPLETE THE PENDING REGULATORY PROCESS AND ISSUE A FINAL RULE

Delaying or preventing the issuance of a final rule, based on concerns about how the final rule might turn out improperly preempts the regulatory process provided by the FLSA. In the FLSA, Congress quite consciously left undefined those broad terms describing which jobs were exempt ("any employee employed in a bona fide executive, administrative, or professional capacity") and explicitly placed on the Secretary of Labor the duty to "define and delimit" the terms used in the exemptions. Congress also explicitly provided that the Secretary's actions in defining and delimiting the exemptions are subject to the provisions of the Administrative Procedure Act.

The rulemaking process has been respected and followed by the U.S. Department of Labor in a lawful, prudent and orderly manner. The Department received nearly 80,000 comments during the three-month comment period, addressing all aspects of the proposed rule—pro and con. Included in the comments filed were comments by many employers, and although there were differences among employers' comments on many aspects, employers did generally support the Labor Department's efforts to update the exemption regulations. At this point, everyone awaits the issuance of the final regulations.

Regardless of whether one agrees or disagrees with particular provisions of the Secretary's proposed regulations, and regardless of where one will stand with regard to specific features of the as yet unknown final regulations to be enacted, the Secretary has undertaken to do exactly that which Congress has prescribed and GAO has recommended, and she has followed the procedures dictated by the APA. Congress should permit the Secretary to complete that process.

Faced with such clearly outdated regulations and with reports by the General Accounting Office and others urging an overhaul of the regulations, the current Secretary of Labor undertook the long neglected task of providing regulations that were meaningful for the modern workforce. This was a task that earlier Administrations, both Democratic and Republican, had considered but shied away from, undoubtedly over concern that revising these regulations would be controversial.

During 2002, the Department initially met with over 40 interest groups, representing employers and employees, to learn of their suggestions and concerns. On March 31, 2003 the Department of Labor published proposed regulations in the Federal Register, and requested comments on the proposal. See 68 Fed Reg 15560–15597 (March 31, 2003). In the preamble to the proposed regulations, the Department explained the existing regulations and the changes proposed, and provided comparisons between the two. In accordance with Executive Order 12866, the proposal included a Preliminary Regulatory Impact Analysis, and a regulatory flexibility analysis assessing the impact of the proposed regulations on small businesses, as required by the Regulatory Flexibility Act. The public had an opportunity to comment on these economic analyses, as well as on the substantive provisions of the proposed regulations.

The rulemaking record remained open for 90 days. When it closed on June 30, 2003, the Department of Labor had received almost 80,000 comments. As the Department has testified, it is in the process of reviewing those comments and determining what changes it should make to the proposed regulations and the economic analyses, based on the comments received.

This is the rulemaking process contemplated by the Fair Labor Standards Act and the APA, and it is a process that is fair and orderly and that should be respected by this Committee. The Secretary should be applauded for undertaking such a meaningful revision, and the Department should be allowed to conclude what it has started by issuing a final regulation. Of course, once the final regulations are issued, there will be ample opportunity for review. Under the Congressional Review Act, the

Department of Labor will be required to submit the final regulations to Congress and the regulations will not take effect before Congress has had an opportunity for review, and if it chooses, Congress may, of course, pass a joint resolution of disapproval. This is the very same procedure Congress invoked in 2001 to overturn the Department of Labor's newly promulgated ergonomics standard.

Even in the absence of Congressional review, the final regulations will undoubtedly be the subject of challenges in the courts. Congress should not deprive interested parties of the opportunity to seek judicial review.

THE PROPOSED RULE WILL FOSTER COMPLIANCE, AND SHOULD REDUCE LITIGATION CLAIMS

Although the purpose of my testimony is not to comment on all the details of the proposed changes—the volume of comments filed with the Labor Department have provided a full and comprehensive analysis of nearly every facet of the proposed rules—there are some general points that bear recognition. The proposed regulations—intended to simplify and clarify—are a significant step forward to ensure that the white collar exemption regulations can be understood and enforced in the 21st Century workplace, thereby avoiding the plethora of litigation that currently plagues employers.

The proposed regulations include significant improvements. Generally, if included in the final regulations, the streamlined tests for executive, administrative and professional exemptions should make compliance easier and provide greater certainty. This result directly benefits all stakeholders—employers, employees and the Labor Department. Greater compliance should directly result in lower litigation claims and resulting exposures.

Although the higher standard salary test of \$425 per week (\$22,100 per year), which is a 170 percent increase, may impose a hardship on some sectors of the economy including small businesses and more rural locations, we recognize that these considerations are balanced to some degree by the benefit of gaining greater clarity under the new regulations. Under the proposed \$425 salary test, there at least would be a return to the original criteria that required a salary of a sufficient amount in order for a position to be eligible for classification as exempt.

Many have asked what will be the effects if the proposed regulations are enacted. The only employees who will be affected, if the proposed salary level becomes final, are those who will start to receive overtime. The estimates by the Labor Department are that 1.3 million workers now exempt would gain overtime protection by the new \$425 per week (\$22,100 per year) requirement. These are employees who today are performing jobs with exempt duties but who are being paid below the \$425 per week salary requirement.

The proposed regulations also retain and clarify the two long-standing requirements for classifying employees as exempt—the duties and salary tests. There are, however, new duties tests for white-collar exemptions. Some of the proposed changes result in more demanding requirements. For example, under the executive duties test of the proposed regulations, employees are required to (1) have a primary duty of managing the entire enterprise or a department or subdivision, (2) direct the work of two or more other workers and (3) to have hiring/firing authority or substantial influence over these decisions. Under the proposed regulations, the administrative duties are also modified and require an employee to hold a “position of responsibility” instead of requiring the exercise of “discretion and independent judgment.” The professional duties test under the current regulations is retained, but the proposed regulation clarifies when education and experience qualify an employee as a professional. The current discretion test is eliminated from the professional exemption.

The proposed regulations retain the salary basis requirement that employees be paid a fixed, predetermined salary for each week in which the employee performs work. The liability for improper deductions or “dockings” is reasonably limited to the employees who are directly affected.

The proposed regulations add new eligibility for exempting highly compensated workers with an annual salary of at least \$65,000, if they perform office or non-manual work and meet one of the duties of either an exempt executive, administrative or professional employee. The payment of a salary of \$65,000 or more does not meet the requirements for the highly compensated worker, unless the duties requirements also are satisfied.

**MISINFORMATION AND CONFUSION RELATING TO THE PROPOSED WHITE-COLLAR
EXEMPTION REGULATIONS**

There also has been a significant amount of confusion resulting from inaccurate information and news stories relating to the proposed regulations, and I would like to briefly address some of those matters. The most recent example is the widely circulated Associated Press story alleging that the Labor Department has counseled employers to circumvent the proposed rules in the rulemaking. Nothing could be further from the truth.

Let me set the record straight on this point. The Department of Labor's March 2003 notice of the proposed rule summarized the lawful alternatives for meeting the salary requirements. The proposed regulations do not change the current alternatives for meeting the salary requirements. See 68 Fed Reg 15576. As required by Executive Order 12866 (signed by President Clinton in 1993), the Labor Department prepared a Preliminary Regulatory Impact Analysis and published a summary of that analysis with the proposed regulations. As it was required to do, the Labor Department analyzed the costs of complying with the current regulations and the proposed regulations and prepared a cost comparison of the two. This necessarily required the Department to identify the means by which employers could comply with the current and proposed regulations, and the Labor Department quite appropriately identified employers' options for structuring and paying their workforces in order to comply with the regulations. By no stretch of the imagination did the Department advise employers on how to avoid paying legally required overtime.

Another common misconception is that the proposed regulations will result in a "take away" of overtime on a widespread basis. Again, this is not the case. Although we can allow economists to project the impact of the proposed regulations, the only changes that are guaranteed are that 1.3 million workers gain overtime protection because of the new \$425 per week requirement.

Many employees' representatives have raised false alarms, claiming that their exempt/non-exempt status will be changed by the proposed regulations. Take nurses, for example. Registered nurses currently can be exempt, even though the overwhelming majority receives overtime, and that classification remains unchanged. Generally Licensed Practicing Nurses currently are not exempt, and their status would not change. Police Officers and Firefighters generally are not exempt today, and the same result would be reached under the proposed regulations. Unionized employees will continue to receive overtime as provided by their collective bargaining agreements. Again, there is no change from the current regulations.

CONCLUSION

Where do we stand today? The Department of Labor is in the last stage of a drawn out and long overdue rulemaking process. With some liberties to a well-known expression, let me close by noting that rulemaking delayed clearly is justice denied. The current regulations are not serving anyone's interests except those of class action lawyers. Employers and all stakeholders will benefit from rules that can be understood and complied with. If the Labor Department improperly changes the regulations, then there are ample avenues of redress, including judicial review and the Congressional Review Act, which can prevent the regulations from taking effect. At this point, I respectfully submit that Congress should not prejudge the outcome. Instead, Congress should allow the rulemaking process to conclude and then, if necessary, debate whether the rules are proper.

Thank you for your time. I will be happy to answer any questions you may have.

Senator SPECTER. Thank you, Mr. Fortney.

**STATEMENT OF DR. JARED BERNSTEIN, Ph.D., CHIEF ECONOMIST,
ECONOMIC POLICY INSTITUTE**

Senator SPECTER. We turn now to Mr. Jared Bernstein, Senior Economist at the Economic Policy Institute, served as Deputy Chief Economist at the U.S. Department of Labor from 1995 to 1996, a Ph.D. in social welfare from Columbia University.

Thank you for joining us, Mr. Bernstein, and the floor is yours.

Dr. BERNSTEIN. Mr. Chairman, it is a great privilege to testify before you today. And I thank you for the opportunity to be here.

Surely one of the most critical issues before this committee is an accurate assessment of how many workers would stand to lose

overtime protection if these new rules are enacted. And that question has already come up numerous times today. As is well known, the Department of Labor's own analysis finds that only 644,000 workers would lose that right. Our analysis, as has been cited here today, at the Economic Policy Institute, however, finds that 8 million employees stand to lose the right to overtime protection.

Now both sides agree that some of those currently covered will be hurt by the new rule. Yet the difference between the two estimates is clearly large enough to totally change the way one views the proposal. The point of my testimony is straightforward. Once we adjust the Department's estimate for a fundamental omission, our estimates are far more similar than they appear. And the relevant numbers are also on this chart that we provide on the easel over there.

Let me cut right to the central point. In order to determine who would lose overtime protection under the proposal, we must consider all those whose jobs are covered under current law. Whether or not these employees actually work overtime is irrelevant. What matters is that if they do so, they must be paid time and a half. By dint of their coverage, they are covered by the Fair Labor Standards Act in exactly the way the law intended. The employer faces a financial cost associated with overtime.

The fact that workers could lose this protection, that covered workers could lose this protection, is what matters in any policy analysis of this proposal's impact. Yet when they looked at who would lose coverage, the DOL looked not at the full group of covered workers but at a small subset, the 10 million currently working overtime. That ignores about 70 million workers placed at risk by the proposed rule.

Now the Department's apparent assumption is that employers would only reclassify those workers who are already costing them time and a half. This means they fail to consider a significant cost incentive created by their proposal. The cost to an employer of an hour of overtime by a reclassified worker falls from time and a half to zero. Thus, we have to adjust the Department's estimate for this omission and figure out how many covered workers would lose coverage regardless of whether they are currently working overtime.

As was described in my written testimony, when we make such an adjustment, the number of hourly workers who lose overtime protection in the DOL's impact analysis, not ours, in that of the DOL, goes from 644,000 to just under 5 million. When it comes to salaried workers, the DOL and EPI's estimates were never that far apart. Quoting from the Department's own analysis, "An additional 1.5 to 2.7 million employees will be more readily identified as exempt from the overtime requirements of the FLSA because the updated duty test will replace the current duties test in determining their exemption."

So this compares to our estimate that 2.5 million salary workers would likely to be reclassified. Okay. Put this altogether. Take the mid-range of the Department's own estimate for salaried workers, the one I just mentioned, that is 2.1 million, add this number to the adjusted hourly worker count, 4.8 million, and the DOL estimate of those at risk for losing coverage is not the widely publicized value of 644,000, it is 6.9 million.

Now the Department has frequently asserted that their sole motivation for the new rules is to clarify and update current standards. Well, how then could so many workers end up losing their protected status under current law? The answer is that the language changes in the new rules vastly broaden the criteria for exemptions.

To stay within my allotted time, I will not give specific examples of occupations likely to be reclassified due to the broader language in the new proposal. But I have many such examples and would be happy to share them during a Q&A, if that would be helpful.

Thus far, I have focused my critique on the Department's undercount of those who stand to lose overtime protection. But the DOL also argues that 1.3 million workers would gain coverage under the new rule. However, as detailed in my written testimony, close to half of those workers are blue collar and manual workers. And they are already covered. They gain nothing new under the proposal. The Department cannot claim credit for covering workers who are already protected under current law.

PREPARED STATEMENT

In conclusion, we submit that an accurate answer to the question of how many workers stand to lose overtime protection from the new rule depends on examining the proposal's impact on all covered workers. Once so adjusted, the Department's estimate is that 4.8 million hourly workers could lose protection. Add that to their finding that about 2 million salary workers will be reclassified exempt. And they find that close to 7 million could lose coverage.

Now our estimate is larger still. But under either analysis, the potential loss of compensation and income to America's working families is far more dramatic than the Department's published analysis has suggested throughout this debate.

Thank you.

[The statement follows:]

PREPARED STATEMENT OF DR. JARED BERNSTEIN

INTRODUCTION

Mr. Chairman, it is a great privilege to testify before this committee, and I and my colleagues at the Economic Policy Institute (EPI) thank you and your staff for the opportunity to be here.

As the committee is well aware, in March of 2003 the Department of Labor (DOL) proposed major changes to the rules governing the treatment of overtime in the Fair Labor Standards Act (FLSA). Since the proposal was introduced, a rousing debate has ensued regarding the number of workers predicted to lose their current coverage under the FLSA such that they would no longer be compensated at a rate of time-and-a-half for each hour of overtime worked. A correct answer to this question is obviously a critical piece of information, perhaps the most critical piece for those entrusted with the responsibility of evaluating the potential impact of the proposal.

As is well known to those who have followed this debate, the Department of Labor's own analysis finds that only 644,000 workers would lose the right to overtime pay. EPI's analysis, however, finds that this fate would befall 8 million employees who benefit from overtime protection under current law.

Clearly, these are very different estimates of the new rule's impact. And neither estimate is benign—all sides agree that some of those who are currently covered will be made exempt and lose current protections. But the difference between the two estimates is large enough to totally change the way one views the proposed changes.

Much of what follows shows that these two estimates are far less different in some ways than they might initially appear. Once we adjust the Department's estimate for a fundamental flaw—that is, its sole focus on those working overtime in

the single survey week examined instead of the full set of hourly workers who are covered by overtime protection—and add in its less-publicized estimate of 1.5 to 2.7 million workers exempted by the new duties tests, then the vast difference between the two impact analyses disappears. As shown in the accompanying chart, when we correct for these omissions, the DOL results reveal that about 7 million employees would lose overtime coverage under the new rules, which is quite close to the 8 million we predict would lose such protection.

EXPLAINING THE DIFFERENCE BETWEEN THE IMPACT ESTIMATES

Thankfully, it is not hard to explain the main source of the different estimates. In trying to determine who would lose overtime protections, the Department of Labor only considered persons who are currently working overtime. While about 90 million hourly workers are currently covered by the FLSA's overtime regulations and thus are eligible for time-and-a-half pay when they work overtime, the DOL's widely published number—the number they have set forth in front of this committee—is based only on the 11 to 12 million who were actually paid for overtime at the time of the survey.

A moment's reflection should reveal that this is a major oversight, one which results in misleading policy analysis. A fundamental rule of impact analysis is that you must look at the whole group that is potentially affected by a proposed policy, in this case, the covered workforce. The thrust of our analysis is that if this rule becomes law, the rules that determine overtime protection for each one of these 90 million workers will change. Thus, a serious effort to determine the impact must consider all covered workers, not solely those actively working overtime at a given point in time.

If the rule becomes law, every employer will be faced with a significantly altered set of incentives regarding the cost of overtime, and this fact also underscores the need to look beyond the 14 percent of hourly workers being paid for overtime at the time the survey was conducted. By paying them 1.5 times their base pay for overtime, these employers are sending a clear market signal that this is a worthwhile expenditure. But if we lower the price of overtime—and that, at its heart, is the impact of this proposed rule change—we gut a critical disincentive built into the FLSA, one that has worked for decades to ensure that employers pay a premium for having covered workers work beyond 40 weekly hours.

Take away that premium—the extra 50 percent that non-exempt workers must receive for overtime—and some employers will have both opportunity and reason to reclassify covered workers as exempt and assigning them unpaid overtime hours. No credible policy analysis would ignore such a huge change in cost incentives facing employers, but that is precisely what the DOL's impact analysis does.

Another way to view the difference between the estimates is to note that EPI examines changes in the number of workers covered by the FLSA while the DOL examines changes in the number of workers who received overtime pay during the week when the survey was conducted. The EPI approach, which examines the erosion of coverage, is more appropriate because the rule change can lead to significant earnings losses among workers who lose coverage even though they happened not to work any overtime in the survey week. For one, those who did not work overtime when the survey was taken may well do so in some other week. Second, because of the removal of a major disincentive for employer's to "purchase" more overtime, there will be workers who currently aren't asked to work overtime but who, once they lose coverage, will be asked to do so without additional pay.

To reiterate, by ignoring the impact of the proposed rule on millions of workers who are currently protected by FLSA overtime regulations (even when they are not currently working overtime), the DOL's estimate is not credible and provides a misleading view of the impact of the change.

In fact, if we simply extrapolate from their estimate based on this critique, we find that the two estimates are not all that far apart. The ratio of hourly workers with overtime protection to those actively working overtime is about 7.5. This ratio is the factor by which the Department underestimated the affected group that ought to have been considered in their impact study. Multiply this factor by their 644,000—the number of those working overtime who would become exempted—and the result is 4.8 million, close to our estimate of 5.5 million hourly workers who would lose protection under the new rules. This result is shown in the third bar in the "Hourly" panel of the accompanying chart.

Turning to the impact of the rule change on salaried workers, EPI's and DOL's approaches were similar (as were their findings). In this part of the DOL's impact analysis, it examines the impact of changes in the duties tests on how salaried employees are classified, which is very much akin to our own approach, and is histori-

cally the way this work has been undertaken. The following statement appears on page 15580 of the preamble to the rule:

“The PRIA [the DOL’s impact analysis] indicates an additional 1.5 million to 2.7 million employees will be more readily identified as exempt from the overtime requirements of the FLSA because the updated duties tests will replace the current duties tests in determining their exemption.”

The preamble states that, based on their current duties, these workers are unlikely to pass the existing exemption tests and are thus covered by current overtime rules. However, due to the very changes in the proposed rule that we examined in our analysis, the Department concludes that these workers would pass the new tests, and would be classified as exempt from overtime protection. Note that EPI found that 2.5 million salaried workers would become exempt as a result of the change in the duties test, slightly below DOL’s higher estimate (see the “Salaried” panel of the accompanying chart). It is unclear why an estimate of this magnitude—that approximately 2 million workers could lose overtime protection from the new rule—was given such little attention by the DOL in its presentation of its findings. Instead, the DOL chose to focus on the exemption of 644,000 hourly workers.

WILL 1.3 MILLION EMPLOYEES REALLY GAIN COVERAGE?

Thus far we have focused solely on those who will lose coverage under the proposed rule. The Department of Labor also claims that their rule would cover an additional 1.3 million who are not currently eligible for overtime pay. The agency argues that because the proposed rule raises the coverage threshold from \$155 to \$425 per week (or \$22,100 per year), 1.3 million salaried workers will gain overtime protection that they currently lack. But here again the DOL’s analysis is flawed, leading in this case to an overestimate of the number who would gain coverage under the new rules.

The DOL made two critical mistakes in this estimate. First, its 1.3 million estimate includes 600,000 workers who are already covered under current law. These workers are not in white-collar occupations and thus cannot be exempted on the basis of their duties (their occupations are farming, forestry and fishing, transportation and material moving, handlers, equipment cleaners, helpers, laborers, machine operators, assemblers and inspectors, none of which could be exempted as executive, administrative, or professional employees).

The Department mistakenly assumed that, since these 600,000 workers have earnings above the current minimum salary test of \$155/week, they would gain protection under the new rule that lifts that minimum. But, in fact, the DOL is counting them as becoming newly covered when they already are covered under current rules.

This leaves 700,000 legitimate salaried, low-income, white-collar workers earning less than \$22,100 per year (these include executive, administrative, managerial, and professional employees, as well as technicians and related support workers, sales, administrative support, and clerical employees). Here the Department made a second error. Some of these workers could, indeed, be helped by the new rule, but since DOL admittedly failed to examine their duties, we have no way of knowing their coverage status under current law. Surely, it is a mistake to assume that all of them, including clerical workers, are currently and legitimately classified as bona fide executive, administrative, managerial, and professional employees. But that is precisely the assumption that DOL makes.

In fact, according to Acting Solicitor of Labor Howard Radzely, the Department of Labor “concluded that information regarding duties is not relevant” because these workers would all be guaranteed overtime under the proposed rule. But again, this represents a fundamental analytic flaw: by ignoring their current duties, the DOL fails to make a determination of how many of these low-income, white-collar workers are currently covered, and thus it cannot determine how many are gaining overtime protection under the new higher salary test.

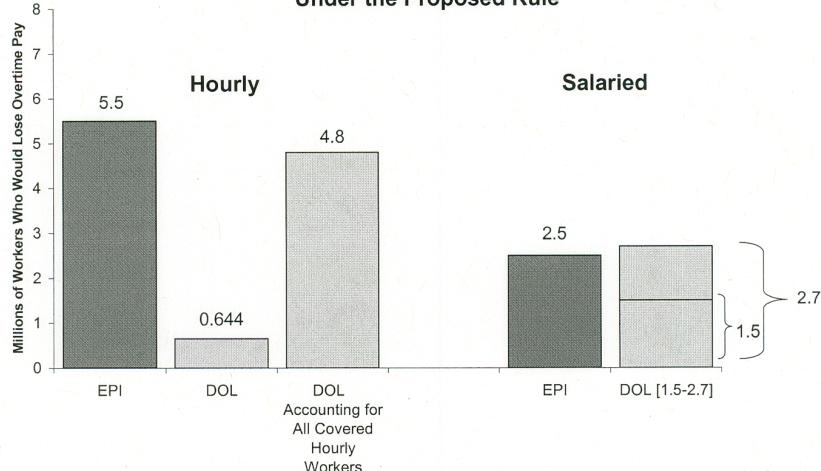
CONCLUSION: ALIGNING THE DOL AND EPI ESTIMATES

A good deal of confusion has been generated by the difference between EPI’s and DOL’s claims as to how many workers stand to lose overtime protection from the new rule, with our estimate at 8 million and theirs at 644,000. In fact, once we appropriately adjust the Department of Labor’s estimate of hourly workers to account for the fact that the Department only looked at a small subset of the affected group, and we include their own estimate of 1.5 to 2.7 million salaried workers who would be newly exempted due to their changes in the duties tests, both the DOL and EPI arrive at similar numbers of affected employees. As shown in the accompanying

chart, when these factors are taken into account, the Administration's own results reveal that about 7 million employees would lose overtime coverage under the new rules, an estimate that is quite similar to the EPI estimate of 8 million workers losing such protection.

By examining only those employees working overtime at a given point in time, and ignoring the far larger group of hourly workers who are not now overtime workers but could easily be so in the future, the Department of Labor generated a misleading undercount of who would be hurt by the new rule. This is especially the case when we consider that the proposed rule change has the potential to eliminate the cost disincentive currently in place to discourage employers from using and abusing overtime. Such a change is likely to lead to the reclassification of millions of workers from their current nonexempt status to exempt from overtime protection. At that point, they will no longer be compensated for overtime, violating the word and spirit of the FLSA.

Reconciling EPI and the Department of Labor's Estimates of the Number of Workers Who Would Lose Overtime Protection Under the Proposed Rule



Senator SPECTER. Thank you very much, Dr. Bernstein.

STATEMENT OF DR. RONALD BIRD, Ph.D., CHIEF ECONOMIST, EMPLOYMENT POLICY FOUNDATION

Senator SPECTER. We now turn to Dr. Ronald Bird, chief economist of the Employment Policy Foundation. Prior to his current position, Dr. Bird was the chief economist for DynCorp, has a Ph.D. in economics from the University of North Carolina at Chapel Hill.

Thank you for joining us, Dr. Bird. And we look forward to your testimony.

Dr. BIRD. Thank you, Mr. Chairman. Good afternoon.

My name is Ron Bird. I am chief economist for the Employment Policy Foundation. I am honored to testify before the committee this morning, or this afternoon, actually, on the issue of the Department of Labor's proposed revision of the Fair Labor Standards Act's white collar regulations. You have a printed copy of my full statement, which I will briefly summarize under three main headings.

First, the need for the FLSA rules revision, why this revision is long overdue. Second, the impact of the proposed revision, why the rule will clearly benefit millions of employees, and why claims of

harm are unreliable and speculative. And third, I will address recent allegations regarding the intent of the Department of Labor's impact analysis, why claims that DOL is providing guidance to employers is just plain wrong.

First with regard to need, it has been over 50 years since the core definitions were revised and 25 since these salary thresholds were revised. In that time, substantial shifts have occurred in the workplace and in the economy as a whole because of the changes in job structure, in duties, in technology. Applying regulations largely written before the creation of the first transistor requires a more intensive effort for every FLSA status determination. And employers may be having to make 40 million of these a year, these determinations.

Second, regarding impact, when we cut through the rhetoric about impact of rule changes, one fact is indisputable. Workers who today earn between \$155 a week and \$425 a week will go from today's uncertainty about their status to absolute certainty that they are covered. A minute ago, Mr. Trumka made a reference to the need for definitively saying that people are covered. This aspect of the proposal definitively says that people who make between \$155 and \$425 are covered and entitled to overtime, and it cannot be taken away.

Today, the coverage of workers who make between \$155 and \$425 is dependent on their job duties, on what their job description is. Whatever status they have today, be it exempt or nonexempt, could change. Raising the salary test threshold to \$425 will make their status as covered and entitled absolute and certain.

DOL estimated that 1.3 million employees who work full time and are currently paid on a salary basis, who are presumed to have currently exempt duties, would be directly affected, would move from exempt to nonexempt status. But you also need to be aware that there are currently 36.4 million employees altogether who earn between \$155 and \$425 per week, including salaried and hourly, part time and full time. For all of these, the right to overtime pay will be made absolute, will be made, as Mr. Trumka said, definitive. For all of these, the right to overtime, if this proposal is adopted, cannot be taken away.

Now, as to claims that 8 million currently nonexempt employees would pass the revised duties test and be reclassified who are not exempt today, there is an element here in this analysis that is inherently speculative. They are based on subjective guesses about duties that underlie the job titles that we do know in the available data. The available economic data does not provide the facts that we need as analysts to precisely and with certainty, with statistical certainty, determine whether an individual performs duties considered exempt. Available data only counts job duties, the job titles. The duties behind these titles are uncertain.

Even if someone can be classified as exempt, however—and this is the big leap that is being made in a lot of the discussion—there is, in fact, no assurance that they will be changed from hourly or salaried status. Millions of people today are paid on an hourly basis and get overtime, not because the FLSA requires it, but because that arrangement works best for them and their employer.

Third—and I see my time has expired, and I will wrap up very quickly here—regarding the claims about guidance, if DOL wanted to give advice to employers as to how to evade overtime, I think they could have done better than hide it 40 pages deep inside a technical document that only economists are apt to read.

PREPARED STATEMENT

Fourth, no scenario of the ones that DOL presented, none of those scenarios actually result in lower payroll cost for the employers. Three of the four alternatives that DOL examined result in higher wages for employees and higher payroll costs. The fourth reflects zero change, but it is, in fact, the Roosevelt administration's original purpose in proposing an overtime premium, to spread work. The assumptions DOL made are not guidance. Rather they are the kind of thorough analysis that you expect in any good regulatory impact statement.

Thank you. And I will be pleased to answer questions.
 [The statement follows:]

PREPARED STATEMENT OF DR. RONALD BIRD

I am Ronald Bird, Chief Economist for the Employment Policy Foundation (EPF). EPF is a research and educational foundation established in 1983 to provide policy makers and the public with the highest quality economic analysis and commentary on U.S. employment policies. On behalf of EPF, I appreciate this opportunity to provide information and analysis regarding the need for and impact of proposed revisions to the Department of Labor's white collar regulations under the Fair Labor Standards Act (FLSA). The proposal in question is the first comprehensive attempt in fifty years to update the terms and definitions of these regulations (29 CFR Part 541) that define the criteria to be considered an "executive, administrative or professional" employee exempt from overtime. For the earnings thresholds that affect coverage status, it has been over 25 years since the last revision.

BACKGROUND

The Fair Labor Standards Act generally requires that employers pay workers at mutually agreed hourly rates above the statutory minimum, keep records of weekly hours, and, in the event that hours exceed 40 during any week, pay a fifty percent overtime premium for the excess hours worked. The overtime provisions of the FLSA do not apply universally. The 1938 law recognized that the hourly pay approach did not fit the realities of work for certain executive, professional or administrative office jobs.

The law directed the Secretary of Labor to issue regulations to define the types of jobs and circumstances that would qualify for exemption from the hourly pay, 40 hour week, and overtime premium requirements. By giving the duty of defining specific details of terms and conditions for exemption to the Department of Labor, Congress recognized that circumstances meriting exemption were apt to change over time as the economy evolved. Delegating the task of setting and revising the thresholds and definitions to DOL suggests that the Congressional authors may have anticipated that adjustments would need to be made more frequently than would be convenient if Congress kept the responsibility to itself.

Since the 1930s, DOL's FLSA regulations have required that exempt managers, professionals, and administrative office workers must be paid on a fixed weekly or annual salary basis regardless of hours worked. Since 1975, the rules have required that the salary be at least \$8,060 per year (\$155 per week) relative to the basic "long-test" duties list, and at least \$13,000 per year (\$250 per week) relative to the less stringent "short-test" list of duties.

COMPARISON OF SALARY BASIS AND HOURLY BASIS OF PAY

The salary basis test is an important element of the rule that has sometimes been overlooked in discussions of the current regulatory proposals. The proposed rule is not just about the simple question of whether or not someone is paid an overtime premium. The FLSA rules affect the basic principles by which wages are negotiated

and calculated. The distinction between those covered by FLSA overtime premium rules and those exempt from those rules involves a fundamental difference in way in which compensation is negotiated and paid.

Rules for Exempt Employees.—Because the FLSA rules require that exempt employees be paid a fixed salary that does not vary with weekly hours worked, any deviation from the fixed weekly wage standard by pay docking may void the exempt status of the employee. This means that the exempt employee has the assurance of a predictable paycheck regardless of fluctuations in the employer's labor needs. The employer and employee are relieved of responsibilities to keep records of hours worked.

In addition, the sociological implications of the time-clock in the workplace are interesting. I recall how pleased my grandfather was the day his status changed to exempt: What seemed to matter most to him was not the small increase in pay or the altered title but the fact of not having to "punch the clock." Exempt status carries with it a certain degree of autonomy in the workplace that many individuals value.

Being exempt also means that the employee knows that working hours may fluctuate from week to week, and the employee's salary demand reflects the employee's expectations about both the expected average hours and the degree of fluctuation. In a well-functioning, competitive labor market, salaries will adjust to reflect the reality of expected average hours of work and weekly variance in hours. The disadvantage to the employee arises when the actual hours of work exceed the employee's expectation.

Sometimes discussions about FLSA status imply this disadvantage when it is said that the exempt worker is not "protected" from demands for extra hours or is not paid for the full amount of time committed to the job. However, this risk is tempered by the mobility of the employee in the labor market. Having education and skills that are in demand and being in a labor market where employment is growing and unemployment relatively low are important considerations that also protect employees from such risks. The main disadvantage is that the salaried employee may have to bear the transaction costs of re-negotiation with the current employer or of seeking other employment to redress the balance between his or her time preferences and wages.

Rules for Nonexempt Employees.—For employees who are not exempt from the FLSA rules, the law establishes an entirely different scheme for wage negotiations and pay calculations. Wages must be based on a basic hourly wage rate ("straight-time" rate) that applies to any hours worked through 40 per week. The hourly wage rate rather than the sum of total earnings becomes the focus of labor market negotiation and transaction. Records have to be kept and clocks punched. Weekly hours over 40 are paid at one-and a-half times the basic rate. This arrangement has both advantages and disadvantages. The advantage is that the employee has less need to worry about fluctuations in required hours beyond the 40 limit. Unexpected work demands are either reduced or well compensated. The fifty percent overtime premium is designed to be large enough to ensure that most employees are compensated more than sufficiently for any extra hours required. The disadvantage to the employee is the down-side fluctuation in earnings when work is slack, and the possibility that the overtime premium may discourage employers from offering over 40 hours of work to any one employee—spreading the total amount of work over more individual employees.

It may be useful to remember that protecting employees from unexpected demands for extra work hours was not the main policy motive behind the FLSA in 1938. The main motive was to increase the total number of individuals employed by encouraging employers to constrain hours and share the total work hours among a wider number of labor market participants. That was an understandable policy goal in the context of the stagnant economy and high unemployment of the time.

The distinction between exempt employees and non-exempt employees is not a distinction between being paid fairly and being paid unfairly. It is misleading for anyone to imply that exempt employees are working unpaid hours as a general rule. The banishment of exploitation and oppression from the workplace was one of the great achievements of our nation in the 20th century, and there is no basis to fear their return in the 21st century. Both exempt and non-exempt workers are paid fairly. Indeed, some researchers have found evidence that they are paid equivalently—that the earnings of both categories average out to the same result over time in terms of total annual earnings and total hours worked after controlling for different characteristics of occupations, education and experience.

THE WORKPLACE HAS CHANGED DRAMATICALLY

The proposed revisions to the white collar regulations are long overdue. The FLSA was enacted in 1938, and the regulatory structure of definitions and categories of duties implementing its pay classifications have remained essentially unchanged since 1954. The minimum salary thresholds for possible exempt status were last changed in 1975. The law has changed little, while the workplace it governs has changed enormously.

Today's American workplace is different in structure and more complex in its organization than the workplace of 1938. The workplace transformation of the past sixty five years reflects at least five dimensions of change that affect relevance and applicability of current FLSA regulations:

Industrial Structure.—Before World War II, nearly one-in-three (33.6 percent) workers were employed in manufacturing. In contrast, today less than one-in-seven (13.6 percent) works in the manufacturing sector. The industries that have experienced relative job growth are characterized by workplace organizations in which job duties are not as narrowly defined as they were in manufacturing in the 1940s. The number of jobs where duties do not clearly fit the categories defined by the current FLSA rules has increased considerably. Even in manufacturing, technological and organizational advances that have raised productivity have also blurred the definitional lines of many job responsibilities, qualifications, and duties. The result of these changes in industrial structure and workplace organization has been to complicate significantly and increase the number of FLSA coverage/exemption status determination decisions that employers must make each year.

Occupational Structure.—Managerial and professional jobs have increased more than any other category. In 1940, only about one-in-six workers (17.9 percent) were employed in managerial or professional occupations. Today, nearly one-in-three employees (30.1 percent) work in such a position. Under the FLSA, job title alone is not sufficient to determine coverage or exemption status. The outdated regulations make the process of determining FLSA status for workers in management and professional jobs the most complex and time consuming.

In 1940, nearly one-half (48.2 percent) of all employees worked in occupations related directly to manufacturing and production, including: laborers, craftspeople, construction workers, assembly-line workers and machine operators. Jobs related to manufacturing and manual production are now less than one-in-three of all occupations (28.5 percent). In 1938, determination of coverage status for workers in these types of occupations was fairly straight-forward—the job title and the job duties were closely aligned and readily associated with decision criteria of the FLSA rules. Today, the number of "easy classification" jobs are fewer, and even among production occupations, technological and organizational changes have often blurred the lines of distinction on which the current duties tests rely.

These changes in occupational structure mean that many more jobs today than in the past may qualify for exemptions defined in the Fair Labor Standards Act. The increase in the number of potentially exempt jobs makes it much more important today that the regulations implementing the exemption concepts be clearer, and easier to apply. The larger number of decisions about exemption status that must be made in today's workplace magnifies the cost burden of rules that are complex and cumbersome.

Education.—Just as occupational and industrial structure have changed, educational attainment of the workforce has also changed dramatically. In 1940, it was not uncommon for the typical worker to be a high school dropout—over three-quarters (75.1 percent) of all adult workers had never finished high school.

Today, over 58 percent of the population age 16 and older has at least some post-secondary (college-level) education. Over 38 percent of workers now have a college-level degree. Only 11.9 percent have less than a high school diploma. Between 1998 and 2001, the number of jobs held by college graduates has increased 5.8 million while employment of persons with no more than a high school diploma has declined by 1.7 million.

The increase in employment of college graduates reflects the changing structure of the workplace and increasing need for workers who can think critically and analytically, and who can manage and coordinate their work activities through complex automated information, process control and communication systems. Increased educational attainment is also associated with increased diversity of job duties and the breakdown of traditional organizational hierarchies in the workplace. These education-related changes have blurred the definition of professional work as currently defined in the FLSA regulations and made the process of determining status of employees under the regulations more complex.

Earnings.—Changing occupational structure and rising educational attainment have resulted in a workforce that is significantly better paid than 65 years ago. Today, the average full-time, year-round worker earns \$44,579 and 15.7 percent of full-time, year-round workers earn over \$65,000. The trend is towards greater numbers of high earning workers. Since 1992, the number of full-time, year-round workers earning over \$65,000 in real 2002 dollar equivalent doubled from 7.4 million to 14.9 million. The number of full-time, year-round workers making less than \$65,000 increased 18.7 percent. Growth of jobs paying \$65,000 or more accounted for 37.5 percent of total employment growth for full-time, year-round workers over the past decade.

Higher earnings have made it more important that status determinations under Part 541 be accurate. The confusion and complexity associated with the current rules mean that both employees and employers have more at stake, and both will benefit by revised rules that make the status determination process simpler, easier to understand, and less prone to error or disagreement. The possible loss of overtime pay to employees who are wrongly classified as exempt is an apparent concern, despite statistical evidence that classification has little or no impact of average weekly earnings.

Workplace Dynamics.—Beyond the changes in workplace structure, education and earnings, the American workplace has become more dynamic in terms of employment growth and turnover. Technological change, global competition and changing social norms have resulted in a workplace in which new jobs are created and old jobs eliminated at a faster rate than ever before. In 1938, most workers expected to stay with a single employer for his or her working life. Today, average job tenure is under five years and declining.

The typical worker entering the workforce today can expect to change jobs seven times over a working life. Both new jobs created by economic growth and replacement job openings created by job-shift turnover and retirement result in decisions that employers must make about FLSA coverage/exemption status. According to data from the Bureau of Labor Statistic's Job Openings and Turnover Survey, private sector employers made 45.6 million hiring decisions in 2002, despite a total employment level that was essentially unchanged. The 45.6 million hiring actions reflects replacement of employees who lost jobs, changed jobs or retired. This 42.2 percent turnover rate indicates the flux of job creation, i.e., the job elimination and job switching that constantly characterizes our dynamic labor market.

Each of these hiring actions involves some degree of decision-making regarding FLSA coverage/exemption status of the job. For replacement positions, the decision may be limited to a review of the existing determination to confirm whether it is still appropriate. For newly created positions, the decision making process to determine FLSA coverage/exemption status is more lengthy. Net job growth (1.6 million annually) is a minimal estimate of new job positions created. Because of changing job duties, expansion and contraction of employment within industries, and offsetting job eliminations and creations, the number of new positions that require more intensive effort for determination of coverage/exemption status may include a sizable number of the 45.6 million hiring actions per year previously identified as "replacement" hires.

Increased Regulatory Burden Now and in the Future.—Each of the categories of change discussed above reflects on-going and accelerating forces affecting the American workplace. These changes have already increased the regulatory burden under the existing Part 541 rules to a significant degree. The higher regulatory burden has already raised costs and eroded competitive advantages. The effect the regulatory burden has been especially hard for manufacturing and other production workers who have seen their jobs lost to foreign competition. The increased burden of the regulation has harmed some of the very workers that the original law was designed to protect.

However, the need for revisions to Part 541 does not rest solely on the history of workplace change and increased burden. The changes described here are on-going and accelerating. The impacts seen thus far may be dwarfed by the adverse impacts that will accumulate in the future if action to modernize the rules is delayed. The greatest justification for changing the existing rules is avoidance of adverse economic impacts that will result in the future if nothing is done now.

The complexity and ambiguity of the existing rule is evidenced by the amount of disagreement and litigation it generates. For the past two years, FLSA issues—many related to this rule—have been the leading employment-related civil action in federal courts.

The DOL proposal is a revision that is long overdue. It has been on the regulatory agenda for 25 years. Inflation, along with rising real wages, has rendered the long-test for exemption—applicable to employees making between \$155 and \$250 per

week—almost moot. In 2001, 78.7 percent of employees who earned between the current minimum threshold of \$155 per week and the proposed new salary test threshold of \$425 also earned over \$250 per week. For those 5.4 million full-time and part-time employees, determination of their exemption status was based on an attenuated list of duties under the “short test.”

The proposal would ensure that everyone who earns less than \$425 is classified as non-exempt. They would be guaranteed the protections of the FLSA, including having a basic hourly wage rate defined, having their working hours tracked and recorded, and being paid a fifty percent hourly wage rate premium in the event that they work over 40 hours during a given week.

THE IMPACT OF THE PROPOSED REVISION ON EXEMPTION STATUS

Recent discussions about the proposed revision have focused largely on the questions of how many people gain exempt status and how many might lose exempt status. In fact, many policy makers have expressed dismay over the wide fluctuations in estimates of how employees will be affected. The reason for these fluctuations is that solid empirical research and reliable survey data that identifies actual classification status of individuals is scarce and incomplete.

- The available data tells us with fair accuracy how much people earn per week. So, we know how many people earn amounts below and above the relevant salary thresholds—\$155, \$250 and \$425.
- We also know with fair accuracy the actual hours that people believe they worked in each monthly survey reference week and how many hours they think they usually work in a typical week. So, we can identify people who work part-time (under 35 hours per week), full-time (over 35 hours per week).
- We can identify the number who work over 40 hours per week and consequently would be entitled to overtime premium pay if classified as non-exempt.
- We know whether people say they are paid on an hourly basis or a salaried basis. So we can presume by the salary test that people paid hourly are non-exempt and currently get overtime premium pay, but we do not know whether they are currently exempt solely because of their pay method or also because of their duties.
- We even know to a reasonable degree of specificity the number of people whose occupations fall under various job titles, but we do not know enough about their duties to say with certainty who is actually exempt under the current rules and who is not. Because duties tests remain a major element of the proposed new rules, the same problem applies to attempts to estimate the number who would be exempt under the proposed rule.

The limitations of the data have led to attempts to associate duties that relate to classification status with job titles for which we have employee counts. Some researchers have conducted assessments of samples of written job descriptions and interviews of employees to duties associated with occupations. In other cases, wage and hour enforcement officers have made broad estimates of the percentage of people with currently exempt duties in each occupation based on their field experience. These estimates are useful, but they are not precise, some were based on information or experience that is now outdated, they are not based on statistically valid random samples of the universe of employees. The estimates of exempt proportions of jobs under selected occupation titles are a pragmatic effort to overcome the limitations of available data, but such estimates are inherently subjective and speculative.

The Impact of Revised Salary Thresholds.—Because employee salaries are more readily known than job duties, we can be most certain that raising the salary threshold for exemption will increase the number of workers who are absolutely eligible for overtime regardless of what their duties are today and regardless of how their duties may evolve in the future so long as their pay stays below the threshold. Currently 36.4 million employees earn between \$155 and \$425 per week. These include 29.5 million who are paid hourly and 6.9 million who are paid on a salary basis.

All of the employees who are paid on an hourly basis are non-exempt by definition because they are not paid on a salary basis. The extent to which their duties reinforce non-exempt status is not known with certainty.

Some of the salaried employees may be non-exempt under current rules also and would be entitled to overtime premium pay in the event that they worked over 40 hours. Because exempt status depends on duties, we do not know the number for certain, but DOL used existing subjective estimates of exemption probabilities based on past assessment studies to estimate that 1.3 million salaried workers who now usually work full-time are likely exempt today and would definitely become non-exempt under the proposed revision.

The Employment Policy Foundation examined the DOL estimate and concluded that it was a very conservative estimate of the number of individuals who would be converted to non-exempt status by the proposed increase in the salary threshold. EPF found that 5.1 million salaried employees currently work full-time (35 hours or more in a typical survey week) and, therefore, may work over 40 hours at least some weeks during the year. Even if many of these workers are presently non-exempt by duties (DOL estimated that 75 percent were non-exempt), they all benefit to some degree by having their status more surely defined by the increased salary threshold. In addition, there may be some among the hourly pay group who currently have duties that would make them eligible for exemption except for their hourly pay basis.

It is important to recognize that everyone who is eligible by duties for exempt status is not automatically paid on a salary basis. For example, I used to work for a government contractor firm. My job duties as an economist and education qualified me for exemption as a professional, and my weekly earnings were in excess of the minimum thresholds. Nevertheless, my employer and I agreed to an hourly pay arrangement. My earnings fluctuated from week to week depending on my recorded hours, and I was paid an overtime premium when I worked over 40 hours. Needless to say, I frequently wanted to work over 40 hours a week but the boss was less frequently willing to let me work as many extra hours as I would have liked.

The point is that I was an hourly worker, and non-exempt because of the pay status, but my employer could have treated me as exempt based on duties. That did not happen because it was in both of our interests to keep things on the hourly basis. For me, it meant occasional extra income, and for my employer it meant less risk of losing me to a competitor because I was happy with the arrangement. In today's labor market, many employees have more bargaining power than was typical 50 years ago. An employer who would change an employee's status to shave a few cents off the payroll would do so at his peril and risk losing a valuable worker to a competitor.

Impact on Employees Who Earn Over \$425 Per Week.—Some have argued that changes in certain definitions of exempt duties will cause employees who now are entitled to overtime to be reclassified as non-exempt. Estimates of the number affected have been published based on subjective evaluations of how changes in wording of duties definitions would change the percentage of exempt people under each occupation title. At their foundation, however, these estimates are purely speculative and subjective. Five lawyers representing one perspective on the issue will come up with very different subjective conclusions than five lawyers representing another perspective, and all of them will come up with different conclusions than five lawyers selected at random.

Indeed, the idea that you need lawyers to figure out the meaning of the exemption criteria is the heart of the problem with the current rules. This complexity is the reason DOL is trying to simplify the rules and make them relevant to contemporary language and contemporary ways of organizing work. Employees and employers should be able to read the rules, and each know and both readily agree on the right answer to the exemption eligibility question.

Consider one example.—The proposed rule replaces the requirement that an employee exercise "discretion and independent judgment" with a new "position of responsibility" requirement for exemption as an administrative employee. The current language is as follows:

"In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered."—(§ 541.207(a)) and "The term does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise."—(§ 541.207(d)(2))

The proposed new language requires that an exempt employee perform:

"Work of substantial importance [that] includes activities such as . . . Making or recommending decisions that have a significant impact on general business operations or finances; analyzing and recommending changes to operating practices; planning long or short-term business objectives; analyzing data, drawing conclusions and recommending changes; handling complaints, arbitrating disputes or resolving grievances; representing the company during important contract negotiations; and work of similar impact on general business operations or finances. Work of substantial importance thus is not limited to employees who participate in the formulation of management policies or in the operation of the business as a whole. It includes

the work of employees who carry out major assignments in conducting the operations of the business, or whose work affects general business operations to a significant degree, even though their assignments are tasks related to the operation of a particular segment of the business.”—(proposed § 203(b))

This change has been cited to support claims that thousands of employees would be reclassified as exempt and lose earnings that they now receive. The reality is that such claims are only a wild guess. There is no objective data about job duties at sufficient specificity to determine whether the proposed change in wording will change the result for anyone. To the extent that anyone might become exempt who is not exempt now, it is also reasonable to consider that some who are now exempt might become non-exempt.

Also, one should consider whether any rational employer would reclassify an employee and cut effective pay in a job market where most people are not trapped and where many of us have more options and opportunities than we did 50 years ago. Unilateral reclassification is likely to increase turnover, and turnover cost is a much more critical concern for today's human resource managers than overtime payroll cost.

DOL DID NOT PROVIDE GUIDANCE TO EVADE THE LAW

Amid the recent controversies about duties definitions, several press articles reported in error that the Department of Labor's economic analysis of the proposed rule was guidance to employers on how to avoid their obligation to pay overtime. EPF examined the complex questions involved in estimating the economic impact of the proposed regulation. When an agency proposes new or revised regulations, the government is required to publish an extensive analysis of the likely economic impacts of the proposal. The impact analysis requirements mandate that the government describe in detail all of the assumptions and contingencies that go into its estimates and consider all possible ramifications of the proposed change.

Press reports described the DOL analysis of alternatives for calculating the cost of converting from salary to hour wages as guidance for circumventing the payment of overtime. If DOL had intended to provide guidance to employers, it is unlikely that they would have hidden it 40 pages inside a technical document and the preamble to the proposed regulations that only economists and policy analysts are apt to read.

Press articles described the DOL analysis of alternatives for calculating the cost of converting from salary to hour wages as guidance for circumventing the payment of overtime. In fact, three of the four alternatives discussed result in higher wages than the employees in question are currently earning. The only alternative that might hurt an individual employee is the one that reflects the original Roosevelt administration intention for the FLSA—cutting hours to 40 per week and sharing available work among other employees. The compensating wage adjustment alternative examined in the DOL regulatory analysis is a logical extension of the reduced hours scenario based on the idea that employees might choose to negotiate terms that would enable them to maintain their desired working hours and earning objectives despite the intention of the FLSA to discourage employers from offering extra work opportunity.

The complex policy analysis problem that DOL examined in its preliminary regulatory impact analysis document arises from the fact that currently exempt salaried employees do not have a clearly defined hourly pay rate to use in the computation of the cost of converting them from exempt to non-exempt status when the salary threshold is raised. Their base hourly rate is unclear because their hours vary from week to week while their pay is fixed. This problem introduces a major uncertainty into the regulatory impact analysis.

The following hypothetical example illustrates the four scenarios that are covered by the DOL analysis. In this example, assume that Jane is currently an exempt manager who is paid \$400 per week, and this week she worked 40 hours, but last week she worked 32 hours and the week before that she worked 50 hours. Over the entire year she averages 41 hours per week. There are four different ways to logically calculate how the proposed change of Jane's status from exempt to non-exempt would affect her potential earnings and her employer's payroll costs.

1. Calculate Jane's pay based on a "straight-time" rate of \$10 per hour (her \$400 per week salary divided by a 40 hours per week standard). This approach assumes that Jane is currently not being paid anything for the 41st hour worked during the average week—i.e., she agreed to a \$400 salary based on the expectation of a 40 hour (or less) weekly work requirement and regrets her employment choice. On this basis, Jane would get \$15 for the average weekly hour of overtime, raising her

weekly earnings to \$415. Her annual earnings would go up by \$780, if her employer continues scheduling an average of 41 hours of work per week.

2. Calculate Jane's wages based on an hourly rate of \$9.76 per hour (\$400 per week divided by the average 41 hours per week of work) This alternative assumes that Jane expects to work 41 hour a week on average and accepted a \$400 weekly salary on that basis. In this case her \$400 weekly pay already includes a "straight-time" equivalent payment for the 41st hour at the base rate, but switching Jane to non-exempt status would trigger a 50 percent wage premium for the hour of overtime during the average week. Her average weekly earnings would increase by \$4.88 per week or \$254 per year.

3. Avoid the whole issue by raising Jane's salary to \$425 per week, which will maintain her FLSA exempt status under the proposed rule. This approach will save Jane and her employer from the paperwork of keeping time records and ensure Jane a predictable weekly paycheck, regardless of fluctuations in actual hours. This approach would raise her annual earnings by \$1,300 to \$22,100.

4. Limit Jane's hours to 40 per week, and hire additional workers to cover the extra hours needed. This is the approach that was envisioned by President Roosevelt and the authors of the FLSA in 1938—a shortened work week that would create jobs for more individuals. Based on Jane's average hourly equivalent wage rate of \$9.76 per hour, Jane's annual earnings would decrease by \$390 as her annual working time was decreased by 52 hours. Someone else (a new employee or a part-time employee assigned additional hours) would pick up 52 hours more employment and an extra \$390 per year in earnings. The net impact on employers would be zero—the payroll total would be unchanged.

The fourth alternative deserves special attention, because it suggests that the proposed change could lower Jane's earnings. Because the hours worked would be reduced also, it might be argued that Jane would be no worse off. The impact depends on how Jane values extra time off from work versus extra income.

If Jane valued extra income more highly than time off, she might take a second job to supplement her income. Currently about five percent of the work-force holds a second job—"moonlighting" for extra income because their primary jobs do not offer them enough hours to meet their weekly earnings desires. The fact that the typical second job pays a lower hourly rate than the primary job, suggests that these individuals would be willing to work more hours on their primary jobs if the opportunity were available.

Alternatively, if Jane wanted extra income instead of extra hours off, she also might bargain with her employer to let her continue earning an average of \$400 per week by continuing to work 41 hours per week on average, subsequent to implementation of the proposed FLSA rule change. This unchanged average weekly wage solution makes sense from the perspective that Jane is currently choosing 41 hours a week of work (on average) for a salary package of \$400. Her continuing employment choice reveals she is satisfied with getting \$400 for a work week that averages 41 hours. If she and her employer agree to an equivalent "straight-time" hourly wage rate of \$9.64, then she can earn the same \$400 per week and be equally satisfied after the new rule goes into effect by being paid for 40 hours at \$9.64 per hour and one average weekly overtime hour at \$14.46 (rounding results in six cents extra). This alternative assumes that Jane cares only about the total amount that she is paid and not about how the amount is calculated. It saves Jane the trouble of finding and scheduling a second job to achieve her earning goal.

The "straight-time" rate in this example is slightly less than the \$9.76 average hourly rate that results from simple division of Jane's \$400 weekly salary by 41 average hours. Recent economic research supports the theory that this sort of adjustment has occurred in the past in response to existing FLSA overtime rules. Trejo (1991) compared persons covered by FLSA overtime rules in the 1970s and those who were not.¹ He found that for similar persons who worked the same hours, their weekly earnings were nearly identical regardless of whether their wage computation included an overtime premium. In other words, for workers who are concerned only with the total earnings and expected total hours of work, then a change in FLSA classification status has no economic impact on the overall outcome of competitive labor markets. The proposal would not change payroll costs, total hours of work or employee earnings.

Our examination of the DOL impact analysis found that the alternatives discussed are the opposite of guidance. They are carefully considered examinations of how the marketplace may operate as people make free choices to adjust to a changed policy framework. The alternatives represent a good-faith effort by DOL to

¹ Stephen J. Trejo, "The Effects of Overtime Pay Regulation on Worker Compensation," American Economic Review, vol. 81, no. 4 (September 1991), pp 719–740.

consider the full range of possibilities. This thoroughness is the hallmark of good regulatory impact analysis.

Thank you for the opportunity to present my views. I will be glad to answer any questions that you may have.

Senator SPECTER. Thank you very much, Dr. Bird.

STATEMENT OF ANDREW J. McDEVITT, MANAGER, GOVERNMENTAL RELATIONS, AMERICAN PAYROLL ASSOCIATION

Senator SPECTER. Our next witness is Mr. Andrew McDevitt, manager of the governmental relations at the American Payroll Association here in Washington, BA degree in political science from California State University.

Thank you for joining us, Mr. McDevitt. And the floor is yours.

Mr. McDEVITT. Good afternoon, Mr. Chairman. My name is Andrew McDevitt. And I am the manager of government relations for the American Payroll Association. It is my privilege today to appear before your committee to provide APA's specific comments concerning the U.S. Department of Labor's proposal to amend the regulations governing how employers determine if their white collar workers are to be classified as exempt from the minimum wage and overtime requirements under the Fair Labor Standards Act of 1938.

The APA is a nonprofit, professional association representing 21,000 companies and individuals in all 50 States and Canada. APA's central mission is to educate its members in the entire payroll industry about the best practices associated with paying America's workers their wages while successfully complying with all Federal, State, and local employment, tax withholding, and information reporting laws.

APA's secondary mission is to work with legislative and executive branches of all levels of government to find ways for employers to meet their requirements under law and support government objectives while minimizing administrative burden for government, employers, and individual taxpayers.

When the Department of Labor released its proposed revisions to the FLSA regulations in March 2003, APA and its members were very enthusiastic about the prospect of these sweeping and necessary changes. APA believes that the changes proposed by the DOL are needed to benefit both employers and workers so that legal controversies about worker classification matters, as it pertained to overtime pay, can be eliminated or minimized.

The duties test for the existing regulations, which describe the type of work that is exempt from overtime, has not been changed since 1949. However, the workplace has certainly changed a lot since then. And there are countless jobs held by workers today that did not even exist at that time. With rules and examples that do not recognize today's workplace, it is very difficult for an employer to make a decision as to exempt status.

The task of classifying workers correctly is a very important one in ensuring that workers are properly paid what they are entitled to receive under the law. But, as one can observe in the various courthouses throughout the country, worker classification lawsuits are on the rise because the outdated overtime exemption regulations provide little guidance to help employers properly classify their workers in today's dynamic and modern workplace.

Since payroll professionals work closely with their human resources counterparts in today's work environment, these proposed regulations are very important to APA. As previously summarized in the letter to the DOL in June 2003, APA and its members are in favor of the direction taken by the proposed regulations and suggests the following improvements upon the DOL's already sound proposal. These suggestions would make it easier for employers to make the appropriate and correct worker classification determinations for their employees.

One, the DOL should strengthen its guidance to provide additional, real-life examples of the types of jobs that will qualify for exemption, including guidance relating to customer service employees, entry-level researchers, and various types of trainers, including those who provide software or other technical training away from their employer's primary place of business. This expanded guidance would help employers a great deal when applying the new primary duties test to make the accurate classification determination.

Two, additional guidance should be provided to address the circumstances of those workers who may meet the position of responsibility test by virtue of the fact that they are the only individuals in certain positions performing the function of those positions, for example, one-person departments.

The Department should provide more comprehensive guidance addressing the application of the exemption in hospitals and other environments where employees are given supervisory duties on a rotating basis. And the Department should provide additional guidance addressing instances in which the FLSA nonexempt employee temporarily takes on duties of an exempt employee. For instance, in the common situation where a nonexempt employee is filling in temporarily for a supervisor who has taken family or medical leave or is on vacation.

Clarification is also needed for the reverse situation when an exempt employee fills in for an exempt employee or takes on some extra nonexempt work in another area to earn extra money. The DOL should also provide a definition of other non-discretionary compensation, which employers must use to determine if a worker meets the proposed \$65,000 annual salary threshold that would classify workers as exempt from the overtime laws, if they meet any one of the components of the proposed primary duties test.

APA also believes the Department's proposal does not go far enough to define the types of infractions of company rules for which an employer may legitimately dock the pay of an exempt employee.

Finally, the proposal needs to be more specific about whether employers may subtract from leave balances when exempt employees take off fractions of work days for personal reasons.

PREPARED STATEMENT

APA is confident that the additional guidance we are requesting on behalf of employers would help avoid confusion, conflict, and litigation in the future. And most importantly, employers and workers would be able to believe that there are clear and concise labor regulations to which they can refer when worker classification issues arise.

APA thanks you for your time and opportunity today to comment on this important labor issue. And we would be more than happy to answer questions that the committee may have.

[The statement follows:]

PREPARED STATEMENT OF ANDREW J. MCDEVITT

Good morning Mr. Chairman and members of the Committee. My name is Andrew McDevitt and I am the Manager of Government Relations for the American Payroll Association. It is my privilege today to appear before the committee to provide APA's specific comments concerning the U.S. Department of Labor's proposal to amend the regulations governing how employers determine if their "white collar" workers are to be classified as exempt from the minimum wage and overtime pay requirements under the Fair Labor Standards Act of 1938.

The APA is a non-profit professional association representing 21,000 companies and individuals in all 50 states and Canada. APA's central mission is to educate its members and the entire payroll industry about the best practices associated with paying America's workers their wages while successfully complying with all federal, state, and local employment, tax withholding, and information reporting laws. APA's secondary mission is to work with legislative and executive branches of all levels of government to find ways for employers to meet their requirements under law and support government objectives, while minimizing administrative burden for government, employers, and individual taxpayers.

When the Department of Labor released its proposed revisions to the FLSA regulations in March 2003, APA and its members were very enthusiastic about the prospect of these sweeping and necessary changes. APA believes that the changes proposed by the DOL are needed to benefit both employers and workers so that legal controversies about worker classification matters as they pertain to overtime pay can be eliminated or minimized. The "duties" tests of the existing regulations, which describe the type of work that is exempt from overtime, have not been changed since 1949. However, the workplace has certainly changed a lot since then, and there are countless jobs held by workers today that didn't even exist at that time. With rules and examples that don't recognize today's workplace, it is very difficult for an employer to make the decision as to exempt status.

The task of classifying workers correctly is a very important one in ensuring that workers are properly paid what they are entitled to receive under the law. But, as one can observe in the various courthouses throughout the country, worker classification lawsuits are on the rise because the outdated overtime exemption regulations provide little guidance to help employers properly classify their workers in today's dynamic and modern work place. Since payroll professionals work closely with their human resources counterparts in today's work environment, these proposed regulations are very important to APA.

As previously summarized in a letter to the DOL in June 2003, APA and its members are in favor of the direction taken by the proposed regulations and suggest the following improvements upon the DOL's already sound proposal. These suggestions would make it easier for employers to make the appropriate and correct worker classification determinations for their employees:

- The DOL should strengthen its guidance by providing additional, real-life examples of the types of jobs that would qualify for the exemption, including guidance relating to customer service employees, entry-level researchers and various types of trainers, including those who provide software or other technical training away from their employer's primary place of business. This expanded guidance would help employers a great deal when applying the new "primary duties test" to make an accurate classification determination.
- Additional guidance should be provided to address the circumstances of those workers who may meet the "position of responsibility" test by virtue of the fact that they are the only individuals in certain positions performing the functions of those positions (i.e., "one-person departments").
- The Department should provide more comprehensive guidance addressing the application of the exemption in hospitals and other environments where employees are given supervisory duties on a rotating basis.
- The Department should provide additional guidance addressing instances in which an FLSA-nonexempt employee temporarily takes on the duties of an exempt employee; for instance, in the common situation where a nonexempt employee is filling in temporarily for a supervisor who has taken family or medical leave or is on vacation. Clarification is also needed for the reverse situation,

where an exempt employee fills in for a nonexempt employee or takes on some extra nonexempt work in another area to earn extra money.

—The DOL should provide a definition of “other non-discretionary compensation” which employers must use to determine if a worker meets the proposed \$65,000 annual salary threshold that would classify workers as exempt from the overtime laws if they meet any one of the components of the proposed primary duty tests.

APA also believes that the Department’s proposal does not go far enough to define the types of infractions of company rules for which an employer may legitimately dock the pay of an exempt employee.

Finally, the proposal needs to be more specific about whether employers may subtract from leave balances when exempt employees take off fractions of workdays for personal reasons.

APA is confident that the additional guidance that we are requesting on behalf of employers would help avoid confusion, conflict, and litigation in the future. And, most importantly, employers and workers would be able to believe that there are clear and concise labor regulations to which they can refer when worker classification issues arise.

APA thanks you for your time and the opportunity today to comment on this important labor issue and would be pleased to answer any questions that the committee may have.

Senator SPECTER. Thank you very much, Mr. McDevitt.

STATEMENT OF PATTY HEFNER, ON BEHALF OF THE AMERICAN NURSES ASSOCIATION

Senator SPECTER. We now turn to Ms. Patty Hefner, staff nurse at Sewickley Valley Hospital, representing the American Nurses Association; R.N. diploma from St. Margaret Memorial Hospital in Pittsburgh, and a bachelor of science degree in health education from Point Park College in Pittsburgh.

Thank you for joining us, Ms. Hefner. And we look forward to your testimony.

Ms. HEFNER. Thank you, Senator.

On behalf of the American Nurses Association, I would like to thank you for allowing me the opportunity to comment on the proposed changes to the overtime provisions. As you stated, I am a staff nurse at Sewickley Valley Hospital in Sewickley, Pennsylvania. And I have been a registered nurse since 1969.

At the outset of my testimony, I would like to address the Labor Department’s claim that these proposed changes would not affect registered nurses. To be considered an exempt employee, nurses, like all professionals, have to meet strict educational requirements. Under the proposed rule, work experience may be substituted for all or part of the educational requirement for any learned profession, including nursing. This will allow employers, under the proposed rule, to exempt all registered nurses regardless of their level of education from overtime compensation.

Our members represent the interests of registered nursing practicing in hospitals, nursing homes, and a wide range of other health facilities. The implementation of these proposed revisions to the Fair Labor Standards Act will have implications to their practice, their work environment, and, most importantly, the quality of patient care they provide.

Under these proposals, millions of workers, including nurses, who enjoy overtime protection, would no longer qualify for overtime pay. These proposed changes to the overtime regulations will mean a huge pay cut for these workers. For nurses, it will mean longer hours with less pay, and likely mandated hours.

Mr. Chairman, the nursing profession is at a crossroad. Our Nation is struggling with a growing shortage of registered nurses. And this impacts our hospitals, our long-term care facilities, home health agencies, and public health clinics on a daily basis. The shortage is growing just as the need for nursing services is mounting. America's demand for nursing care is expected to balloon over the next 20 years, as a result of an aging population, advances in technology, and various economic and policy factors.

The Bureau of Labor Statistics estimated that attrition and retirement will create more than 1 million openings for R.N.'s between 2000 and 2010. More money by itself will not, of course, solve these projected shortages. But no labor shortage has ever been solved without a market-based set of economic incentives.

Mr. Chairman, I know of no nurse who went into this profession hoping to become a millionaire. Enhancing the professionalization stature and respect of all nursing will make this profession more attractive. One of the main reasons 500,000 registered nurses have left the profession is conditions at the workplace. Nurses across the Nation are reporting a dramatic increase in the use of mandatory overtime.

Today, mandatory overtime is the most common method used by facilities to cover staffing insufficiencies. This dangerous staffing practice is having a negative impact on patient care. It is fostering medical errors, and it is driving nurses away from the bedside. A recent survey by ANA of nearly 5,000 nurses across the country revealed that more than 67 percent are working unplanned overtime every month. Increased reliance on mandatory overtime has occurred at the same time that patient acuity has increased, the use of sophisticated technology has increased, and the length of hospital stay has decreased.

The IOM study, keeping patients safe, transforming the work environment of nurses, recommends limiting the number of hours a nurse can work to 12 hours in any 24-hour period and 60 hours in any 7-day period. Currently, nurses where I work and across the country are paid for overtime, whether this is voluntary or forced.

Overtime pay is not money that most families use to pay for extras, such as luxury items and lavish vacations. For most of us, overtime pay is used to put food on the table, to pay for clothes for our kids, and to fund their college educations. Expanding the number of professional workers, such as registered nurses, who are exempt from overtime protection, will lower the marginal cost for the employers.

Under this misguided proposal, nurses will be working the same long hours they now work, in fact, probably longer hours without overtime compensation. This proposal will take away the one thing that discourages hospital administrators from forcing overtime, and that is the cost factor.

PREPARED STATEMENT

Mr. Chairman, the public understands the vital role that nurses play in delivering quality healthcare to our patients. Just last month, the annual survey by Gallop on the honesty and ethics of various professions again rated nurses at the top. We speak on behalf of all of our patients when we say that these proposed regula-

tions will lead to more nurses leaving the profession, resulting in reduced care, increases in the errors, and the potential for tragic results with our patients. I urge you to help prevent these proposed regulations and changes to the overtime provisions.

Mr. Chairman, thank you again for this opportunity to speak to you.

[The prepared statement follows:]

PREPARED STATEMENT OF PATTI HEFNER

Chairman Specter, members of the Subcommittee, my name is Patti Hefner and I am a Registered Nurse at the Sewickley Valley Hospital in Sewickley, Pennsylvania. I have been a registered nurse since 1969.

On behalf of the American Nurses Association (ANA) which represents the nation's registered nurses through its 54 constituent member associations including state and territorial nurse associations thank you for allowing me the opportunity to comment on the proposed changes to the overtime provisions.

At the outset of my testimony, I want to address the Labor Department's claim that these proposed changes would not affect registered nurses. To be considered an exempt employee, nurses like all professionals have to meet strict educational requirements. Under the proposed rule, as both the text of the rule and the regulatory analysis make plain, work experience may be substituted "for all or part of the educational requirements" for any learned profession, including nursing. This will allow employers, under the proposed rule to exempt all registered nurses regardless of their level of education from overtime compensation.

Also, according to Ross Eisenbrey of the Economic Policy Institute, the new regulations will make it much easier to establish that "a" primary duty of a nurse is administrative or executive. An otherwise non-exempt nurse who spends 90 percent of his or her time providing patient care could still be found to have a primary duty that is administrative or executive, especially since the administrative duty tests have been substantially weakened.

Our members represent the interests of registered nurses practicing in hospitals and nursing homes and a wide range of other health facilities. The implementation of these proposed revisions to the Fair Labor and Standards Act (FLSA) will have implications for their practice, their work environment and the quality of patient care they provide. Under these proposals millions of workers, including nurses who enjoy overtime protection would no longer qualify for overtime pay. Make no mistake about it. The proposed changes to the overtime regulations will mean a huge pay cut for these workers. For nurses, it will mean longer hours with less pay and likely mandated hours.

Mr. Chairman, the nursing profession is at a crossroad. Our nation is struggling with a growing shortage of registered nurses (RNs) which impacts our hospitals, long-term care facilities, home health agencies and public health clinics on a daily basis.

The shortage is growing just as the need for nursing services is mounting. America's demand for nursing care is expected to balloon over the next twenty years as a result of the aging population, advances in technology, and various economic and policy factors. The Bureau of Labor Statistics estimated that attrition and retirement will create more than one million openings for RNs between 2000 and 2010. More money, by itself, will not solve the projected labor shortages, but no labor shortage has ever been solved without a market-based set of economic incentives. Mr. Chairman, I know of no nurse that went into the profession with the hope of becoming a millionaire. Enhancing the professionalization, stature and respect of all nursing will make the profession more attractive.

One of the main reasons 500,000 registered nurses have left the profession is conditions at the workplace. Nurses across the nation are reporting a dramatic increase in the use of mandatory overtime. Today, mandatory overtime is the most common method used by facilities to cover staffing insufficiencies. This dangerous staffing practice is having a negative impact on patient care, fostering medical errors and driving nurses away from the bedside. A recent ANA survey of nearly 5,000 nurses across the country revealed that more than 67 percent are working unplanned overtime every month. Increased reliance on mandatory overtime has occurred at the same time that patient acuity has increased, the use of sophisticated technology has increased, and the length of hospital stay has decreased.

Last November, the Institute of Medicine (IOM) released a report which shows a clear link between the nursing work environment and patient safety, and rec-

ommends improvements in health care working conditions that would lead to safer patient care. The study, Keeping Patients Safe: Transforming the Work Environment of Nurses recommends to limit the number of hours a nurse can work to 12 hours in any 24-hour period and 60 hours in any seven-day period.

Currently, nurses where I work, and across the country are paid for overtime, whether voluntary or forced. Overtime pay is not money that most families use to pay for extras such as luxury items or lavish vacations. For most overtime pay is the money used to put food on the table and clothes on the backs of their children. Expanding the number of professional workers, such as registered nurses, who are exempt from overtime protections, will lower the marginal cost of overtime for the employers. Under this misguided proposal, nurses will be working the same long hours they now work—in fact, probably longer hours, without overtime compensation. This proposal will take away the one thing that discourages hospital administrators from forcing nurses to work overtime—the cost factor!

Mr. Chairman, the public understands the vital role that nurses play in delivering quality health care to their patients. Just last month Gallup's annual survey on the honesty and ethics of various professions rated nurses at the top. We speak on behalf of the patients when we say these proposed regulations will lead to more nurses leaving the profession resulting in reduced care, increases in medical errors, ending in potentially tragic results for the patients that we serve. I urge you to help prevent these proposed regulations and changes to the overtime provisions.

Mr. Chairman, thank you once again for this opportunity to speak to you on this important matter. I would be happy to answer any questions that you may have.

Senator SPECTER. Ms. Hefner, thank you very much for your testimony.

I regret that we are not going to have time for very extensive questioning because the caucuses are now meeting as we prepare for a cloture vote a little later this afternoon. But we will be submitting questions in writing, which we would appreciate your response to.

Ms. Hefner, starting with you, there is no doubt about a major nursing shortage in America. That is something I say from the chairmanship of this Subcommittee on Health and Human Services and also from the chairmanship which I hold on the Veterans' Committee. I have looked at the point and counterpoint with the concerns about whether nurses will be covered and a response that they will not lose overtime pay. But this is an ambiguity which we do not have an answer to.

Mr. McDevitt, as a proponent of the regulations, can you respond? Will nurses be covered? And will there be a risk of nurses losing overtime pay?

Mr. McDEVITT. You know, I am not—I would not call myself a healthcare field expert. So I really could not answer that question. Although what I could do is go back to my association to talk to members that are in that field and submit my response to you in writing.

Senator SPECTER. Well, I would appreciate that.

Mr. Fortney, I would appreciate it if you and Dr. Bird would respond as well, so we can have an idea as to the impact on nurses, and whether you could amplify it as to whether there will be any impact on other healthcare professionals.

Mr. FORTNEY. We would be happy to. And nurses, specifically, Mr. Chair, in fact are exempt today under the regulations. Under the proposed regulations, they would continue to be exempt. Remember, the law—

Senator SPECTER. Would you give me the backup on that?

Mr. FORTNEY. Oh, yes, I will.

Senator SPECTER. I am sorry I cannot go into it in any greater detail now.

Dr. Bernstein——

Mr. FORTNEY. The market factors actually is what compels people to receive overtime today.

Senator SPECTER. Dr. Bernstein and Dr. Bird, you two gentlemen have come to diametrically opposed positions here, our two Ph.D.s as to what is what. Dr. Bird, what do you think of Dr. Bernstein's analysis?

Dr. Bernstein, I am going to ask you the identical question. But you only have 1 minute to answer.

Dr. BIRD. Thank you, sir. I think that we are dealing here with asking very different questions. Dr. Bernstein has said that the Department of Labor, in his analysis, said that the Department of Labor made an error, a serious error, by not including in its analysis people who may or may not lose a hypothetical protection. The Department of Labor, in its analysis, focused on people who were actually likely to have their right to overtime either added to or, in the case of 600,000——

Senator SPECTER. Dr. Bird, I am going to have to ask you to conclude.

Dr. BIRD. Okay. In fact, I think that the Department of Labor did it the right way, because their obligation under the regulatory impact analysis rules was to estimate the cost to employers and to industry and to the economy of adding the protection, primarily of adding the protection that is associated with raising the threshold. They did it correctly.

Senator SPECTER. Dr. Bernstein, do you have——

Dr. BERNSTEIN. No. That misrepresents actually both our and their approach. I mean, we examined all workers who are currently covered by the Fair Labor Standards Act overtime protection. And that is historically what has always been done in this analysis. We in fact not only use the same methodology, we actually purchased the computer code that had been used to do this by the DOL historically. And in every single case, the analysis has been on all covered workers, because they are the group that stands to lose, whether they work overtime or not.

In fact, when we look at salaried workers, as we show on our chart over there, the Department of Labor and EPI comes to almost precisely the same numbers. They find that about 2 million workers would likely be exempt. We find 2.5 million. So our methods are not that far apart, except for this one difference. And I think any policy analyst who evaluates the impact of such a policy would have to agree that all the workers who are covered are in danger of losing coverage. And therefore, they are the appropriate group to examine.

Senator SPECTER. Let me ask all of you to respond to these questions in writing. I wish we could take the time now, but, as I say, we are past the 1 hour and 45 minute mark. This hearing has gone considerably longer than we had expected.

Question one. Do you all agree or disagree with Mr. McDevitt's suggestion that the Department of Labor should strengthen its guidance by providing additional real life examples of the types of jobs which would qualify for the exemption?

Question two. When Dr. Bird testifies about the 8 million figure and he uses the words "subjective guessing about duties," I would like all of your responses as to whether that really is not an underlying problem with the new regulations, as well as the old regulations?

Question three. Then I would like you to respond to the analysis on the examples, which I cited for Secretary Chao, as to whether you think there is a significant improvement in the new regulations and whether you could suggest language to the subcommittee which would realize the agreed objective of trying to eliminate litigation?

WRITTEN RESPONSES TO COMMITTEE QUESTIONS

The subcommittee thanks you all for coming. Again, we wish we could spend longer. But if you would supply those written answers, we would appreciate it. And we will have some more for you, as well.

[The following questions were asked at the hearing for written responses:]

RESPONSES OF RICHARD TRUMKA TO COMMITTEE QUESTIONS

Question. Do you all agree or disagree with Mr. McDevitt's suggestion that the Department of Labor should strengthen its guidance by providing additional real life examples of the types of jobs which would qualify for the exemption?

Answer. A number of employers submitted comments to the Department of Labor (DOL) last June suggesting that the final 541 overtime regulation list particular occupations that are presumptively exempt. Please see attached list of employer comments (also available at <http://www.epinet.org/newsroom/releases/03/09/030903topemployer.pdf>).

We do not believe DOL should expand the scope of the overtime exemptions in this way. As DOL likes to emphasize, the duties tests apply to the job responsibilities of individual workers, rather than entire job occupations. Listing occupations as presumptively exempt threatens to deny overtime protection to individual workers whose job responsibilities do not warrant exemption.

Further, absent a change in the law itself, we think it would be entirely inappropriate and indefensible for DOL to determine that any occupation is presumptively exempt from any section of the FLSA. The courts have consistently held that employees are presumed to enjoy the protections of the FLSA, and that the burden is on employers to prove exemptions. For DOL to determine that any employee, by virtue of his or her occupation, is presumptively exempt would thus be contrary to the language of the FLSA and consistent case law.

Question. When Dr. Bird testifies about the 8 million figure and he uses the words "subjective guessing about duties," I would like all of your responses as to whether that really is not an underlying problem with the new regulations, as well as the old regulations?

Answer. There are two issues raised by this question. One is the difficulty of estimating the aggregate effect of the proposed regulation; the other is the application of overtime eligibility rules to individual employees. Dr. Bird seemed to be referring to the former.

Certainly, the accuracy of any estimate of the aggregate impact of proposed regulatory changes will be strengthened by the maximum amount of data on job responsibilities of workers in individual occupations. At a minimum, any serious regulatory impact analysis would need to begin by estimating the impact on individual occupations and then aggregating those figures. This is the methodology employed by DOL in the past, and it is the methodology used by the Economic Policy Institute (EPI) in its 2003 report. Unfortunately, neither Dr. Bird's organization nor DOL has bothered to estimate the impact of the proposed overtime regulation on workers in individual job titles. It should also be noted that, even in the absence of additional data on job responsibilities, there are many regulatory changes DOL could make with objective certainty that loss of overtime rights would not result.

The second issue is the application of eligibility rules to individual employees. We believe DOL greatly exaggerates the ambiguity of the current overtime eligibility

rules. Application of the current rules does not generally require “subjective guessing.” By and large, employers and courts are very familiar with the current standards and understand their meaning quite well. When overtime litigation occurs, it is generally not because employers cannot manage to decipher arcane overtime rules. It is generally because employers are cheating their workers out of overtime pay in order to minimize labor costs, and DOL enforcement is so ineffective that litigation is the only recourse for cheated workers to enforce the statute. It should be noted that DOL’s proposed regulation would eliminate the much more detailed and precise “long” duties test that provides superior guidance to employers, and DOL would replace it with the vaguer “short” test that is more likely to lead to unnecessary litigation. In other words, an even vaguer and more subjective test is certainly no cure for any problems in the existing rules.

Finally, we reiterate that employees are presumptively entitled to overtime protections. Thus, to the extent that an employer may find the existing rule (or proposed rule) requires subjective judgments, it should err on the side of determining that workers are protected.

Question. Then I would like you to respond to the analysis on the examples, which I cited for Secretary Chao, as to whether you think there is a significant improvement in the new regulations and whether you could suggest language to the subcommittee which would realize the agreed objective of trying to eliminate litigation?

Answer. We do not believe that the proposed new criteria for the administrative exemption are in any way superior to the current criteria. We believe that DOL’s proposed language would not only expand the administrative exemption, but would also result in widespread confusion and increased litigation. This litigation would be precisely the kind that can and should be avoided because it does not result in the vindication or enforcement of workers’ overtime rights.

We do believe there are a number of ways DOL could reduce unnecessary litigation of the kind that does not vindicate workers’ overtime rights.

First, DOL could abandon its proposed regulatory changes that would add considerable ambiguity and confusion to the overtime eligibility regulations and would, as Administrator Tammy McCutchen admitted to the Chicago Tribune, result in a “deluge of lawsuits.”

Second, DOL could apply its inflation adjustment to the salary levels for the clearer and more unambiguous “long” duties test, as it has on the occasion of every previous inflation adjustment.

Third, we support suggestions made by the Economic Policy Institute (EPI) at your hearing of July 31, 2003 (e.g., eliminating any ambiguity that the professional exemption requires a professional degree, and eliminating any ambiguity that exempt workers must spend more than 50 percent of their time performing a primary duty of exempt work).

Fourth, if DOL were to insist on a comprehensive revision, we believe it would be possible to simplify the overtime rules dramatically by refocusing them on the original purposes of the Fair Labor Standards Act (FLSA). The FLSA was intended to discourage excessive hours, to reward workers who work overtime, and to encourage job creation. However, these purposes are not served by applying the 40-hour workweek to management and independent professionals, who presumably control their own workload and work schedules. Greater emphasis on actual and real employee control over work loads and work schedules could dramatically simplify the overtime rules, and would undoubtedly extend overtime protection to more workers, consistent with the original intent of the FLSA.

The bottom line is that clarity and certainty could be easily achieved in ways that maintain or expand overtime coverage, but DOL has shown no interest in this kind of clarification. In fact, DOL has vehemently opposed the Harkin amendment, which would allow DOL to clarify the rules in any way that does not restrict overtime eligibility. Our disagreement with DOL is not about whether the rules should be clarified to reduce unnecessary litigation, it is about whether overtime eligibility should be restricted.

ECONOMIC POLICY INSTITUTE

TOP EMPLOYER GROUPS NAME SPECIFIC OCCUPATIONS AND ACTIVITIES TO BE INELIGIBLE FOR OVERTIME UNDER NEW REGULATIONS

The U.S. Department of Labor obviously knew about an old saying in legal circles that goes something like, “never ask a question you don’t already know the answer to,” when it invited comments from top employer groups on which occupations should be included in the final rule as examples of exempt jobs (68 Fed. Reg. 15559, 15564), i.e., those not eligible for overtime pay.

Not only did eight of the nation's largest employer groups respond to DOL's invitation, they also proposed specific occupations, as well as exempt duties to be included in the final rule. Their responses clearly demonstrate that employers are eager to take advantage of the changes in the proposed regulations to make millions of employees ineligible to receive any extra pay for hours worked beyond 40 per week.

These responses from employers make clear that the proposed regulations could result in substantial changes—despite DOL's assertions to the contrary. The employers who responded clearly interpret the proposed revised regulations as giving them leeway to reclassify employees as exempt from the FLSA's overtime protection.

Moreover, once occupations are reclassified by employers, the only recourse for a worker is to challenge the employer's action, which is almost certain to involve hiring an attorney and lengthy litigation. This recourse is not financially feasible to the vast majority of adversely affected workers.

COALITION, REPRESENTED BY MORGAN, LEWIS & BOCKIUS, LLP

This Coalition is described as "a significant number of employers which conduct business in a cross-section of industry and service sectors, including banking, financial services, education, information technology, aerospace/defense, manufacturing, construction, Internet services, staff, professional consulting services, telecommunications and call center operations." It proposes to:

"Add the following types of work to the list of those that are related to management or business operations of the employer's clients or customers [thus able to be reclassified under the revised administrative exemption]:

- tax experts,
- stock brokers,
- registered broker assistants,
- mortgage brokers,
- loan officers,
- insurance advisors,
- financial consultants,
- benefits consultants & administrators,
- travel consultants,
- dietary managers in retirement homes, and
- staffing recruiters."

"Add the following types of work to the list of those that are related to management or business operations of the employer [thus able to be reclassified under the revised administrative exemption]:

- actuary,
- forensic accounting,
- computer network, database and Internet administration,
- pension & benefit plan administration,
- advice to clients on industry and product trends,
- management of customer relationships,
- customer service,
- organizational development,
- training,
- travel & event planning, and
- projects/process management."

"Work of substantial importance. The Coalition suggests the addition of the following activities to the list of exempt activities [for purposes of revised administrative exemption]:

- representing and preserving the image and reputation of employer to the public,
- representing the company to regulatory bodies and industry groups,
- maintaining client relationships,
- determining financial direction of company or its clients,
- filling employee/contractor vacancies, and
- qualifying borrowers for loans and managing the application process to a closing."

"High level of skill or training. The Coalition suggests the addition of the following types of work to the list of those that satisfy the [new] high level of skill or training' standard [in the revised administrative exemption]:

- sales representatives who manage sales process for specialized scientific or technical products or services,
- computer network and database administrators,
- benefit plan administrators,
- mortgage brokers,

- loan officers,
- insurance advisors, and
- travel consultants.”

AMERICAN COUNCIL OF ENGINEERING COMPANIES

Proposes the following examples of work of “substantial importance” or requiring “high level of skill or training” under the revised administrative exemption:

- Computer Aided Design (CAD) technicians and operators,
- Web designers,
- Engineering designers and senior designers,
- IT department managers without college degrees,
- Geographic Information Systems (GIS) technician/specialist,
- Right of Way agents,
- Construction management representatives or commissioning agents,
- Project managers,
- Financial services analyst.

Proposes the following occupations as examples for the revised learned and creative professional exemptions:

- Any registered engineering and design professionals, including:
- engineers,
- surveyors,
- architects,
- landscape architects,
- planners,
- highway, bridge and rail inspectors,
- computer graphics professionals.

FLSA REFORM COALITION

This Coalition, represented by Gibson, Dunn & Crutcher, describes itself as “a group of leading national employers and trade associations who have been working together for sensible reform of the FLSA exemption regulations for almost ten years. [representing] employers with significant ‘white-collar’ workforces, in diverse field and industries including aerospace, automotive, defense, engineering, insurance, logistics, retail and social services.”

The Coalition requests that the following occupations be included in the final regulation as examples of exempt occupations under the revised administrative exemption:

- assistant program director of social services organization,
- case manager at social services organization,
- engineering designer,
- expedition leader,
- financial statement accountant at retail organization,
- logistics specialist in aerospace industry,
- manufacturing technology analyst,
- quality of care staff for social services and medical providers,
- therapists and counselors for social services organization.

The Coalition requests that the following occupations be listed in the final regulation as examples of exempt jobs under the revised learned professional exemption:

- engineering and architectural designer,
- financial statement accountant (not a CPA),
- logistics specialist,
- manufacturing technology analyst,
- therapists and counselors for social services organization.

NEWSPAPER ASSOCIATION OF AMERICA

NAA proposes that DOL include a discussion of applicability of the learned professional exemption to journalists. “[t]o ensure that there is no confusion about the effect of the revised Learned Professional Exemption to the traditional roles of editors, reporters and photographers.”

NATIONAL ASSOCIATION OF BROADCASTERS

NAB requests that the proposed exemption for creative professionals explicitly include:

- radio news writers,
- broadcast journalists,
- television reporters,

- producers, including field producers,
- news directors,
- television news camera operators.

NATIONAL RESTAURANT ASSOCIATION

Speaking of the revised exemption for “learned professionals” the NRA “applauds DOL for recognizing professional workers who acquire their knowledge through alternative means to certain educational levels . . . In this sense DOL acknowledges that chefs in the restaurant industry are examples of such a mix of acquisition of advanced knowledge.”

NATIONAL RETAIL FEDERATION

The NRF gives the following as examples of jobs that should be included as examples of exempt under the creative professional standards:

- graphic artists,
- designers,
- display designers,
- clothes designers,
- visual managers.

The NRF gives the following as examples of occupations exempt as administrative that should be included in the final regulation:

- compensation analysts,
- financial analysts,
- field project managers,
- assistant buyers,
- merchandise coordinators,
- human resources assistant managers,
- clothing designers,
- textile designers,
- visual presentation managers,
- staffing managers.

AMERICAN HOTEL & LODGING ASSOCIATION

The AHLA requests that the following activities be included as examples of exempt duties:

- market research,
- designing marketing strategies,
- entertaining potential customers,
- formulating sales bids,
- event planning,
- coordinating the work of multiple departments,
- monitoring customer satisfaction.

RESPONSES OF RONALD BIRD TO COMMITTEE QUESTIONS

Question. How many registered nurses are potentially affected by the current and proposed regulations?

Answer. The nation's 2.4 million employed registered nurses (2003 annual average) included 1.8 million paid on an hourly basis (and therefore entitled to overtime pay when working over 40 hours per week) and 612,000 paid on a salaried basis. As professionals, all registered nurses are potentially exempt under the current and proposed FLSA duties test regulations. The fact that 74.8 percent are nevertheless paid on an hourly basis—making them non-exempt by the salary test of FLSA regulations—suggests that the method of pay and classification status are influenced significantly by market factors that go beyond the literal language of the duties tests in the regulations. Having duties that could make one exempt does not mean that one will be treated as exempt. Since the status of nurses as potentially exempt professionals is unchanged by the proposed regulation, there is no basis to expect that any nurses would experience a change in status if the proposal is adopted. It is likely that 74.8 percent of nurses will continue to be paid on an hourly basis and qualify for overtime pay because that is the work arrangement that is mutually beneficial to themselves and their employers. Their current and future pay status reflects such mutual choices and is not determined by current or proposed regulatory language regarding presumptively exempt duties.

Question. How will the proposed changes in the regulation affect my conclusion that estimates of numbers of persons who are exempt or non exempt under duties tests are inherently speculative?

Answer. The speculative nature of estimates of number of persons exempt or non-exempt arises from the inadequacy of available data rather than from ambiguity in the current or proposed regulation. The available data provides only occupation titles. It does not provide any information about job duties of individual's who hold jobs with particular titles. Since both the current and proposed rules define exemption in terms of duties, the available data cannot provide an accurate count of persons who would meet the exemption criteria. Any estimate of the proportion of people with a given job title who also have exemption-eligible duties is inherently subjective and speculative unless it is based on a survey that examines both the occupation title and the job duties reported by employees and employers on a job-by-job basis.

Only the salary threshold (currently \$155 per week and proposed at \$425 per week) provides a criterion that is unambiguous in relation to the available data. We can estimate with statistical precision that 6.9 million salaried workers who currently earn less than \$425 per week will be changed to hourly over-time eligible status by the proposal.

Question. Do you agree or disagree with Mr. McDevitt's suggestion that the Department of Labor should strengthen its guidance by providing additional real life examples of the types of jobs which would qualify for exemption?

Answer. The common sense value of real-life examples is obvious. Illustrations should reflect practical job analysis situations that human resource professionals encounter. Input from experienced human resource management practitioners would insure that illustrations are relevant.

Question. Do you think that the proposed regulations provide a significant improvement to reduce litigation, and could you suggest language to the subcommittee which would realize the objective of trying to eliminate litigation?

Answer. The proposal is a significant improvement. It is clearly written and relevant to the realities of the contemporary workplace. Clearer language is likely to reduce litigation. The fact that the increased salary threshold removes any question about status for over 34 million workers is also an important factor that will contribute to reduced litigation. I have no recommendations for improved language.

I hope that these responses will be helpful to you and to the other members of the subcommittee.

AMERICAN PAYROLL ASSOCIATION,
GOVERNMENT RELATIONS,
Washington, DC, March 17, 2004.

Hon. ARLEN SPECTER,
*Chairman, Senate Subcommittee on Labor, HHS, and Education, U.S. Senate,
Washington, DC.*

DEAR SENATOR SPECTER: The purpose of this letter is to formally respond to the three specific questions that you posed to the American Payroll Association and other organizations represented at the January 20 hearing that your subcommittee held to discuss the U.S. Department of Labor's proposal to modernize the white-collar overtime pay regulations of the Fair Labor Standards Act of 1938. In addition, APA would like to thank you again for providing our organization the opportunity to publicly voice our position on this important labor issue.

As I mentioned at the beginning of my testimony, the APA is a non-profit professional association representing 21,000 companies and individuals in all 50 states and Canada. APA's central mission is to educate its members and the entire payroll industry about the best practices associated with paying America's workers their wages while successfully complying with all federal, state, and local employment, tax withholding, and information reporting laws. APA's secondary mission is to work with legislative and executive branches of all levels of government to find ways for employers to meet their requirements under law and support government objectives, while minimizing administrative burden for government, employers, and individual taxpayers.

In the spirit of APA's secondary mission, APA has prepared the following responses to your questions:

Question. Do you all agree or disagree with Mr. McDevitt's suggestion that the Department of Labor should strengthen its guidance by providing additional real life examples of the types of jobs which would qualify for the [overtime] exemption?

Answer. Since this question was intended for the other panelists to respond to, APA would like to simply reiterate that it believes that the DOL should incorporate “real life examples,” within the proposed regulations, that highlight the types of jobs that would qualify for the exemption, including guidance relating to customer service employees, entry-level researchers and various types of trainers, including those who provide software or other technical training away from their employer’s primary place of business. This expanded guidance would help employers a great deal when applying the new “primary duties test” to make an accurate classification determination. This would be an excellent addition to the proposed regulations that could help to eliminate or minimize the worker classification lawsuits that have been on the rise in recent years.

Question. When Dr. Bird testifies about the eight-million figure and he uses the words “subjective guessing about duties,” I would like all of your responses as to whether that really is not an underlying problem with the new regulations, as well as the old regulations.

Answer. Since the DOL released its proposed white-collar overtime pay regulations on March 31, 2003, various employer, labor, and public policy organizations have debated their potential impact on today’s nonexempt workers. One highly debatable figure in this debate estimates that eight million workers may lose the ability to qualify for overtime pay when they work more than 40 hours in a work week. This debatable figure is a result of how various labor law and policy experts have read and interpreted both the new and old duties-test language within both versions of the regulations to determine the future nonexempt status of today’s non-exempt workers.

When Dr. Ronald Bird of the Employment Policy Foundation testified at the hearing and commented on this debatable eight million figure, he states:

“Estimates of the number [of workers] affected have been published based on subjective evaluations of how changes in the wording of duties definitions [between the new and old regulations] would change the percentage of exempt people under each occupation title. At their foundation, however, these estimates are purely speculative and subjective.”

However, Dr. Bird also states:

“The reality is that such claims are only a wild guess. There is no objective data about the job duties at a sufficient specificity to determine whether the proposed change in wording [of the duties test] will change the result for anyone. To the extent that anyone [worker] might become exempt who is not exempt now, it is also reasonable to consider that some who are now exempt might become nonexempt.”

APA believes that “the subjective guessing about duties” would not be an underlying problem with the new regulations if employers were actually provided with some real life examples of specific jobs and duties that would help clarify who is and who is not exempt from overtime pay.

Perhaps the DOL could determine if there are specific job types and/or duties that are creating the bulk of the growing number of overtime pay litigation cases in the country and provide guidance on these specific jobs within the final regulations so that employers are able to determine the exempt or nonexempt status of workers in these positions. This strategy may help minimize litigation cases that employers are experiencing.

APA also believes it is worth reiterating the following statement contained within Dr. Bird’s testimony when he comments on the impact of the revised salary thresholds in the proposed regulations:

“Because employee salaries are more readily known than job descriptions, we can be more certain that raising the salary threshold for exemption will increase the number of workers who are absolutely eligible for overtime regardless of what their duties are today and regardless of how their duties may evolve in the future so long as their pay stays below the threshold.”

Dr. Bird also makes an interesting observation to addresses the potential impacts of the proposed regulations on workers who earn over \$425 per week and would be subject to the new standard duties test:

“Also, one should consider whether any rational employer would reclassify an employee and cut effective pay in a job market where most people are not trapped and where many of us have more options and opportunities than we did 50 years ago. Unilateral reclassification is likely to increase turnover, and turnover cost is a much more critical concern for today’s human resource managers than overtime payroll cost.”

APA agrees with these assertions made by Dr. Bird and would hope that policy makers consider them as they evaluate the entire DOL proposal in question. The idea of delaying or impeding the implementation of these proposed regulations because of the varying and diverse opinions about their potential impacts would only allow the costly legal struggles that employers are currently facing to continue indefinitely. What harm would there be to employers and workers to at least take a step forward in attempting to improve today's worker classification system that we all know is truly broken? If it is later determined that parts of the proposed regulations have not solved all the worker classification litigation concerns that have been raised, the DOL and stakeholders could take a pragmatic approach and reexamine any potential shortcomings of the proposed regulations and work toward creating additional solutions that would benefit all parties involved.

Question. And then I would like you to respond to the analysis on the examples, which I cited for Secretary Chao, as to whether you think there is a significant improvement in the new regulations and whether you could suggest language to the subcommittee which would realize the agreed objective of trying to eliminate litigation.

Answer. APA believes that there are significant improvements within the entirety of the DOL proposal and that litigation could be eliminated or minimized by incorporating our suggestion that additional "real life examples" of jobs that would qualify for the exemption be incorporated into final version of the regulations. APA would also suggests that the DOL to establish a practice of evaluating these whitecollar overtime regulations every 3–5 years to ensure they are updated appropriately to follow trends in U.S. labor practices, the job market, DOL audits, and FLSA-based lawsuits. This would be more effective than the infrequent modifications and reviews that have been initiated by the DOL in the past 66 years.

Thank you again for providing APA and its 21,000 members the opportunity to publicly comment on this important labor issue and provide further input in answer to your questions. Should you or your subcommittee staff require any additional information from APA, please do not hesitate to ask.

Sincerely,

ANDREW J. McDEVITT,
Manager, Government Relations, American Payroll Association.

RESPONSES OF DAVID S. FORTNEY TO COMMITTEE QUESTIONS

Question. Do you all agree or disagree with Mr. McDevitt's suggestion that the Department of Labor should strengthen its guidance by providing additional real life examples of the types of jobs which would qualify for the exemption?

Answer. In the Proposed Regulations, the Department of Labor has, in fact, provided many "real life" examples of the types of jobs that would fall within a specific exemption. The Proposed Regulations are replete with examples not only of the types of jobs that would fall within an exemption category, but also of the types of duties that would bring an employee within the four corners of an exemption classification. This is clearly in furtherance of the DOL's commitment to issuing regulations that are both substantively/legally sound and reasonably easy for the employer community to understand and apply. Although it is impossible to predict to what extent such examples will remain in the final regulations, it would appear likely that such provisions, which are meant to further compliance by eliminating confusion and promoting consistency of application, will remain in the final version of the regulations. Moreover, DOL requested that parties submit as part of their comments, examples that could be incorporated into the final rule to further explain the application of those rules.

Question. When Dr. Bird testifies about the 8 million figure, and he uses the words "subjective guessing about duties," I would like all of your responses as to whether that really is not an underlying problem with the new regulations, as well as the old regulations.

Answer. Under the current regulations, there is quite a bit of "subjective guessing of duties." Indeed, this is one of the primary reasons why it is so important that these regulations be updated. The Proposed Regulations seek to remedy this problem by providing explicit and detailed examples of duties and types of jobs that will qualify for each exemption. So, where the concepts themselves cannot be better set out, the examples provide guidance and clarity, thus allowing the employer community to apply properly the overtime rules.

Question. Please respond to the analysis on the examples, which I cited for Secretary Chao, as to whether you think there is a significant improvement in the new

regulations and whether you could suggest language to the subcommittee that would realize the agreed objective of trying to eliminate litigation.

Answer. The Proposed Regulations include significant improvements, including the numerous examples designed to create clarity where now there is often confusion. Generally, if included in the final regulations, the streamlined tests for executive, administrative and professional exemptions and the examples designed to illustrate the application of such exemptions should make compliance easier and provide greater certainty. This result directly benefits all stakeholders—employers, employees and the Labor Department. Greater compliance should directly result in lower litigation claims and resulting exposures.

Question. How will the new regulations impact nurses? Will they be covered? And will there be a risk of nurses losing overtime pay?

Answer. The status of registered nurses under the Proposed Regulations is exactly the same as it is under the current regulations, and any attempt to imply otherwise is misleading. Under the current regulations, registered nurses are exempt from the overtime provisions under the professional exemption provisions. In practice however, in large part because of the nursing shortage, which creates a huge demand for nursing services, nurses are demanding and being paid overtime because of the market demand for their services. Nurses are being paid overtime, not because the law requires it, but because that is what the market will bear.

Under the Proposed Regulations there will be no change in the status of nurse compensation. Nurses will continue to be exempt as professionals, and undoubtedly, to the extent the nursing shortage continues, nurses will continue to demand and command overtime pay. Again, under the Proposed Regulations, just as under the current regulations, which have been effective for decades, payment of such overtime is not required by law but merely by market pressures.

CONCLUSION OF HEARING

Senator SPECTER. Thank you all very much for being here. That concludes our hearing.

[Whereupon, at 12:47 p.m., Tuesday, January 20, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

